

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

4-27-70
(3)
749

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,542

FRED B. BLACK, JR.,
Appellant,

v.

SHERATON CORPORATION OF AMERICA, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 19 1969

Nathan J. [Signature]
CLERK

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United States District Court for the District of Columbia

[illegible]

CIVIL DOCKET
United States District Court for the District of Columbia

DATE	PROCEEDINGS	FEES	TOTAL
1967	Deposit for cost by		
Feb.	24 Complaint, appearance; Jury demand filed		1
Feb.	24 Summons, copies (2) and copies (2) of Complaint issued to Defts. #1 and #2. Ser 2/24/67		2
Feb.	24 Summons, copies (2) and copies (1) of Compl. issued to Deft. #3, DA ser 3/1/67; NO ser		3
Mar.	14 Appearance of Hyman Smollar and Richard A. Mehler, of Mehler & Smollar as attys for deft Sheraton Corporation of America and Washington Sheraton Corporation. filed		4
Mar.	15 Stipulation between plaintiff and defendants, Sheraton Corporation of America and Washington Sheraton Corporation extending time for said defendants to respond to April 24, 1967 date on which plaintiff and said defendants may invoke or serve notice of invoking any pretrial discovery in this cause. (fiat)		5
Apr.	20 Motion of deft. #3 for extension of time to answer; P&A; M.C. 4-20; c/m 4-20. filed		6
Apr.	20 Motion of deft. #3 for an order to stay proceedings pending trial of case of U.S. vs. Fred B. Black, Jr., Crim. Nos. 650-63 and 651-63; P&A: affidavit: c/m 4-20; M.C. 4-20: appearance of David G. Bress and Milford O. Cleveland. filed		7
Apr.	21 Motion of defts for extension of time to answer; c/m 4/21/67; affidavit; P&A; M.C. filed		8
Apr.	24 Notice of defts #1 & 2 to take deposition of pltf; c/m 4/24/67. filed		9
May	1 Stipulation staying proceedings to and including 5 days after conclusion of trial on related criminal cases Nos. 650-63 and 651-63; but not later than May 1, 1968. (fiat) (Jones, J.		10
1968			
Feb.	15 Appearance of Collins, Anderson, Ahoy, Quinn and W. as co-coun-		

		11-1-68. (N)	Jones, J.	2
July	23	Stipulation staying proceedings to and including August 22, 1968. (fiat)	Sirica, J.	3
Aug.	23	Stipulation staying proceeding for 30 days to and including September 22, 1968. (fiat)	Hart, J.	4
Nov.	26	Stipulation of counsel extending time within which U. S. Atty. may file answer or otherwise plead to and including January 20, 1969. (fiat) (M)	McGuire, J.	5
Sept.	23	Answer of defts. #1 & #2 to Complaint; cross-claim vs. deft. #3; c/m 9-23-68.	filed	6
Sept.	23	Answer of deft. #3 to Complaint; c/m 9-23-68.	filed	7
Dec.	9	Appearance of Gerald S. Bourke, counsel for plaintiff.	filed	8
Dec.	13	Protective Order Re Discovery. (See order for details and for immediate sealing) (N)	Curran, C.J.	9
1969				
Jan	3	Motion of pltf. to compel answer to questions; affidavit; P & A; c/m 1/3/69; exhibits 1, 2, 3, 4 & 5; M.C.	filed	10
Jan	3	Deposition of Philip M. King for pltf.	filed	11
Jan	23	Stipulation extending time for deft., USA, to answer or otherwise plead to cross-claim of defts, #1 & #2 to and including February 10, 1969.	filed	12
Jan	24	Stipulation extending time that Deft. #3 may have to and including 2/29/69 to respond to Motion to Compel Answer.	filed.	13
Jan	29	Notice of Pltf for Discovery and Production of Documents; P&A, c/m 1/24/69 MC		14
Feb	20	Stipulation extending time for Deft USA to Answer or otherwise plead to Cross-Claim of Defts #1 and 2 to and including March 21, 1969.	filed.	15
Feb	20	Memorandum of USA in opposition to motion to compel answer to Questions and to motion for discovery and production of documents affidavits (3); c/m 2/20/69.	filed.	16

Feb. 20	Response of the USA to motion for discovery and production of documents; c/m 2/20/69.	16
Feb. 20	Motion of Deft USA for a protective order; P & A; c/m 2/20/69; M.C.	17
Feb. 27	Stipulation extending time for Pltf to reply to the opposition of the U.S. to motions to compel answers to questions and for Discovery and for Protective Order to and including March 17, 1969.	18
Feb. 28	Motion to assign Case to single Judge; P & A; Affidavit; c/m 2/28/69; M.C.	19
Mar. 18	Stipulation extending time to March 24, 1969 for pltf. to reply to opposition of United States to plaintiffs motion to compel answers to questions and to respond to motion of the United States for a protective order. (over)	20
Mar. 19	Order assigning case to Judge Gerhard A. Gesell for all purposes, and Clerk is directed to forward all matters pending and henceforth filed to him. (N)	21
Mar. 24	Reply of plaintiff to opposition of the United States to motion to compel answers. c/m 3/24/69.	22
Mar. 24	Reply of plaintiff to opposition of the United States to motion for discovery and inspection; affidavit.	23
Mar. 24	Opposition of plaintiff to motion of The United States for protective order.	24
Mar. 26	Order vacating assignment of Judge Gerhard A. Gesell to case. (N)	25
Apr. 3	Response of USA to pltf's. reply ot opposition to motion for discovery and inspection. c/m 4/3/69.	26
Apr. 3	Reply of USA to pltf's. response to motion for protective order. c/m 4/3/69.	27
Apr. 3	Response of USA to reply to opposition of the USA to motion to compel answers. c/m 4/3/69.	28

		to and including 5/31/69.	filed	20
May 20	(1)	Motion to compel answers to questions pronounced in deposition;		
	(2)	Motion for discovery and production of documents;		
	(3)	Motion for protective Order for USA -- heard in part and continued until May 21, 1969. (Rep. Nicholas Sokol)		
		Sirica, J.		
May 21	(1)	Motion to compel answers to questions pronounced in deposition;		
	(2)	Motion for discovery and production of documents;		
	(3)	Motion for protective Order for USA - resumed, concluded and taken under advisement (Counsel within 2 wks. to submit memoranda, documents and proposed Orders). (Rep. Nicholas Sokol)		SIRICA, J.
June 2		Stipulation extending time for Def'ts to answer crossclaim until June 30, 1969.	filed.	2
Jun 6		Order for United States to produce to the Court for in camera inspection certain documents; further ordering United States to submit a cover document itemizing and identifying all such documents; and directing return of said documents prior to entry of any order or decision on the merits of claim of informer's privilege and itemized list identifying said documents will be retained by the Court under seal pending review of the matter. (N)	Sirica, J.	3
June 19		Motion of Pltr to modify order of 6/6/69; P&A; c/m 6/19/69; M.C. filed.		4
June 25		Response of Def't #3 to memorandum of P&A in support of Pltr's motion to Modify Order; c/m 6/25/69.	filed.	5
July 1		Order denying motion of Pltr to Modify Order (N)	Sirica, J.	6
July 14		Exhibits (4) by Def't. & Exhibit A.	filed	7
*May 14		Order that United States produce to Pltr documents listed in attached "Schedule A" and such documents shall be subject to Protective Order Re Discovery entered December 13, 1968. (N)		
- - -			Sirica, J.	11

July 15	Withdrawal of appearance of Richard A. Mehler as attorney for Sheraton Corporation of America and Washington Sheraton Corp. approved. (fiat) (U) (dated 7/14/69) Sirica, J.	18
July 25	Opinion re plaintiff's motion to compel answer; plaintiff's motion for discovery and inspection; and motion of defendant United States for a protective order. (order to be presented). (U) Sirica, J.	19
Jul 30	Documents impounded per order of December 13, 1968; opened and resealed per conditions of order of December 13, 1968 by direction of Judge Sirica. (N) Sirica, J.	20
Jul 30	Index of "in camera" material submitted to Judge Sirica sealed until further order of Court per direction of Judge Sirica.	20
Jul 30	Receipt of Niel K. Peterson, attorney for Department of Justice, for documents listed on the sealed index delivered to him in a sealed envelope and not to be opened until further order of Court. (Said seals bear imprint of Court seal.) Filed	21
Jul 30	Petition of plaintiff for immediate appeal Filed	22
Jul 31	Transcript of proceedings 7/30/69, pp 1 - 10; Court's copy (Reporter Patricia H. Brockmeyer) Court's copy Filed	23
Aug. 1	Stipulation extending time for defts. to answer cross-motions to and including August 22, 1969. Filed	24
Aug 11	Order denying motions of pltf to compel answers to questions and to compel production of documents; motion of the United States for a protective order denied as unnecessary and the Court pursuant to 28 U.S.C. 1292(b) is of the opinion an immediate appeal from this order may materially advance the ultimate termination of this litigation. (N) Sirica, J.	25
Aug 11	Order establishing control of further proceedings (1) all discovery by parties to be completed by December 6, 1969; (2) Court to hold pretrial conference on December 20, 1969, at which time parties will submit appropriate pretrial order and trial briefs and (3) trial set for January 12, 1970. (N) Sirica, J.	26

Aug.	29	Stipulation extending time for defts. to answer cross-claim to and including Sept. 28, 1969.	filed		
Sept.	25	Certified copy of order of U.S.C.A. granting interlocutory appeal.	filed		16
Oct.	1	Cost bond on appeal of pltf. in sum of \$250.00 with Hartford Accident & Indemnity Co. approved.	McGuire, J.		
Oct.	2	Copy of letter dated 10-1-69 to W. D. Ruckelshaus from G.M. Rourke.	filed		27
Oct.	3	Stipulation extending time for defts. to answer cross-claim to and including 10-31-69.	filed		3
Oct	9	Interrogatories propounded by deft. #3, the United States of America pursuant to Rule 33 of the Federal Rules of Civil Procedures; c/m 10-9-69	filed		29

UNITED STATES DISTRICT COURT

for the

DISTRICT OF COLUMBIA

FRED B. BLACK, JR.
4403 "W" Street, N. W.
Washington, D. C.

Plaintiff

v.

SHERATON CORPORATION OF AMERICA,
WASHINGTON SHERATON CORPORATION,
and UNITED STATES OF AMERICA

Defendants

Civil Action No. 440-617

PLAINTIFF DEMANDS
A JURY TRIAL

FILED

FEB 24 1967

ROBEKI M. STEARNS, CLERK

COMPLAINT FOR MONEY DAMAGES FOR
TRESPASS AND INVASION OF PRIVACY

COUNT ONE

1. The Plaintiff is a resident of the District of Columbia.
2. Defendant Sheraton Corporation of America is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with a present place of business at 2660 Connecticut Avenue, N. W., among others, in the District of Columbia, and at all times relevant to this action has been actively engaged in business in the District of Columbia.
3. Defendant Washington Sheraton Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is authorized and licensed to do business in the District of Columbia, with a present place of business at Sixteenth and "K" Streets, N. W., among others, in the District of Columbia, and at all times relevant

to this action has been actively engaged in business in the District of Columbia.

4. The amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000) exclusive of interest and costs.

5. Defendant Sheraton Corporation of America operates and manages and Defendant Washington Sheraton Corporation owns a hotel known as the "Sheraton-Carlton Hotel", located at Sixteenth and "K" Streets, N. W., in the District of Columbia, and said defendants did so operate, manage and own said hotel during the period from February 7, 1963, to April 25, 1963, and for many years prior thereto.

6. Defendants Sheraton Corporation of America and Washington Sheraton Corporation are in the innkeeping business and, accordingly, in consideration of the payment of stated rates, provide food, lodging, and related services to guests of the Sheraton-Carlton Hotel under the terms customarily offered by innkeepers, including the warranty of quiet enjoyment and freedom from the invasion of the privacy of guests' rooms.

7. In addition to the customary warranties of the innkeeper, defendants Sheraton Corporation of America and Washington Sheraton Corporation have for many years, including the period from February 7, 1963, to April 25, 1963, in their ownership, operation, and management of the Sheraton-Carlton Hotel and in their advertising therefor, held themselves out to the public as providing and have specially warranted that they would provide exceptional privacy and, in particular, freedom from intrusion upon the private and personal affairs of guests at the Sheraton-Carlton Hotel.

8. Relying upon the customary warranties of the innkeeper and particularly upon the special representations, inducements, and warranties of defendants Sheraton Corporation of America and Washington Sheraton Corporation set out above, Plaintiff was a guest at said Sheraton-Carlton Hotel continuously for 10 years prior to and until May, 1966, including the period February 7, 1963, to April 25, 1963, and paid said defendants valuable consideration in return for a suite of rooms, consisting of a living room and bedroom, in said hotel.

9. Notwithstanding the continuing contract between defendants Sheraton Corporation of America and Washington Sheraton Corporation and Plaintiff, said defendants' duty to Plaintiff as a guest, the customary warranties of the innkeeper, and the special warranties on the part of said defendants, on or about February 7, 1963, said defendants did wrongfully, knowingly, intentionally, willfully, and maliciously permit, authorize, and aid and abet certain third parties, namely Carlton Giovanetti, Phillip M. King, William B. Sloan, H. Branch Wood, Robert Shakelford, Charles Shores, and others whose names are not presently known to Plaintiff, employees of Defendant United States, to wrongfully trespass upon Plaintiff's suite, rooms 438-440 in the Sheraton-Carlton Hotel, and invade the privacy of Plaintiff by placing an electronic listening device, commonly known as a spike-mike, through the wall between an adjoining room and Plaintiff's suite, and into said suite, and, by means of such device and/or others, listening to, monitoring, transmitting, and recording the private, personal conversations and business transactions of Plaintiff and his guests continuously for a period of three months; and said defendants did wrong-

fully, knowingly, intentionally, willfully, maliciously and fraudulently conceal from Plaintiff the fact that said listening device was installed and that said trespass and invasion of his privacy were taking place, in order to sustain in Plaintiff a sense of false security in the use of his suite of rooms in the Sheraton-Carlton Hotel; and, after said listening device had been removed, said defendants did wrongfully, knowingly, intentionally, willfully, maliciously and fraudulently continue to conceal from Plaintiff the facts concerning said listening device and said wrongful trespass and invasion of his privacy throughout the remaining years in which Plaintiff was a guest at the Sheraton-Carlton Hotel; and said defendants have continued to so conceal said facts from Plaintiff up to and including the date of this complaint, all to the injury of Plaintiff as hereinafter set forth.

10. Plaintiff first became aware of the wrongful trespass and invasion of privacy which are the subjects of this action in June, 1966, when said trespass and invasion of privacy were publicly disclosed to the Supreme Court of the United States by Defendant United States; and Plaintiff neither knew nor in the exercise of due diligence could have known of said trespass and invasion of privacy before that time because of the willful, malicious, and fraudulent concealment of said trespass and invasion of privacy by defendants Sheraton Corporation of America and Washington Sheraton Corporation, as well as Defendant United States.

11. As a result of defendants Sheraton Corporation of America's and Washington Sheraton Corporation's willful and malicious authorizing, aiding, and abetting of said trespass upon Plaintiff's suite at the Sheraton-Carlton Hotel and said invasion of Plaintiff's privacy, said

defendants' fraudulent concealment thereof and the subsequent revelation thereof, Plaintiff has suffered great mental anguish and pain, embarrassment, and humiliation, including the alienation of the affections of his family, the loss of friends and business associates, public ridicule and humiliation, and the loss of his good name and standing in the community; in addition, Plaintiff has suffered great pecuniary loss, including the destruction of his means of livelihood and the loss of his income.

12. Wherefore Plaintiff demands judgment against defendants Sheraton Corporation of America and Washington Sheraton Corporation in the sum of One Million Dollars (\$1, 000, 000) compensatory damages and Three Million Dollars (\$3, 000, 000) punitive damages.

COUNT TWO

13. Plaintiff repeats and realleges all the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 10 of Count One with the same force and effect as if said paragraphs were here set out in full.

14. Plaintiff incorporates herein by reference those parts of paragraph 9 of Count One pertaining to the duties owed by defendants Sheraton Corporation of America and Washington Sheraton Corporation to Plaintiff, the identity of the third parties involved, and the details of the manner in which the trespass upon Plaintiff's suite and the invasion of Plaintiff's privacy took place; on or about February 7, 1963, said defendants did wrongfully and negligently fail to prevent said third parties from trespassing upon the room of Plaintiff and invading the privacy of Plaintiff, in the manner set out above, and did wrongfully and negligently and intentionally fail to notify Plaintiff of said trespass and invasion of privacy, when

defendants knew or in the exercise of due care should have known that said trespass and invasion of privacy were taking place; and thereafter said defendants did wrongfully and negligently and intentionally fail to notify Plaintiff that said wrongful trespass and invasion of privacy had taken place when defendants knew or in the exercise of due care should have known that such invasion of privacy had taken place, all to the injury of Plaintiff as hereinafter set forth.

15. As a result of defendants Sheraton Corporation of America's and Washington Sheraton Corporation's wrongful and negligent failure to prevent said trespass upon Plaintiff's room at the Sheraton-Carlton Hotel and said invasion of Plaintiff's privacy, said defendants' failure to notify Plaintiff thereof, and the subsequent revelation thereof, Plaintiff has suffered great mental anguish and pain, embarrassment, and humiliation, including the alienation of the affections of his family, the loss of friends and business associates, public ridicule and humiliation, and the loss of his good name and standing in the community; in addition, Plaintiff has suffered great pecuniary loss, including the destruction of his means of livelihood and the loss of his income.

16. Wherefore Plaintiff demands judgment against defendants Sheraton Corporation of America and Washington Sheraton Corporation in the sum of One Million Dollars (\$1,000,000) compensatory damages and Three Million Dollars (\$3,000,000) punitive damages.

COUNT THREE

17. Plaintiff repeats and realleges all the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 10 of Count One with the same force and effect as if said paragraphs were here set out in full.

18. Plaintiff incorporates herein by reference those portions of paragraph 9 of Count One pertaining to the identity of the third parties involved and the manner in which the trespass upon Plaintiff's suite and the invasion of Plaintiff's privacy took place; on or about February 7, 1963, defendants Sheraton Corporation of America and Washington Sheraton Corporation breached the continuing contract between said defendants and Plaintiff, the customary warranties of the innkeeper, and said defendants' special warranty of privacy, by permitting said third parties to trespass upon the room of Plaintiff and invade the privacy of Plaintiff in the manner set out above; said defendants further breached said continuing contract and warranties during said three months by fraudulently concealing from Plaintiff the fact that said listening device was installed and that said invasion of his privacy was taking place; and thereafter said defendants continued to breach said continuing contract and warranties by fraudulently concealing from Plaintiff the fact that said listening device had been installed and that said invasion of his privacy had taken place, until Plaintiff left the Sheraton-Carlton Hotel in May, 1966, and said defendants have continued to conceal said facts from Plaintiff up to and including the date of this complaint, all to the injury of Plaintiff as hereinafter set forth.

19. As a result of defendants Sheraton Corporation of America's and Washington Sheraton Corporation's breach of said contract and warranties, the fraudulent concealment thereof and the subsequent revelation thereof, Plaintiff has suffered great mental anguish and pain, embarrassment and humiliation, including the alienation of the affections of his family, the loss of friends and business associates, public ridicule

and humiliation, and the loss of his good name and standing in the community; in addition, Plaintiff has suffered great pecuniary loss, including the destruction of his means of livelihood and the loss of his income.

20. Wherefore Plaintiff demands judgment against defendants Sheraton Corporation of America and Washington Sheraton Corporation in the sum of One Million Dollars (\$1, 000, 000) compensatory damages and Three Million Dollars (\$3, 000, 000) punitive damages.

COUNT FOUR

21. Plaintiff repeats and realleges all the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 10 of Count One with the same force and effect as if said paragraphs were here set out in full.

22. Plaintiff incorporates herein by reference those parts of paragraph 9 of Count One pertaining to the duties owed by defendants Sheraton Corporation of America and Washington Sheraton Corporation to Plaintiff, the identity of the third parties involved, and the details of the manner in which the trespass upon Plaintiff's suite and the invasion of Plaintiff's privacy took place; on or about February 7, 1963, said defendants did conspire with said third parties to wrongfully trespass upon the suite of Plaintiff and invade the privacy and Constitutional rights of Plaintiff and, in furtherance of said conspiracy, did permit, authorize, aid and abet said third parties to trespass upon the suite of Plaintiff and to invade the privacy and Constitutional rights of Plaintiff as set forth above; in furtherance of said conspiracy, said defendants did conceal said trespass and invasion of privacy and Constitutional rights from Plaintiff and by so doing sustained in Plaintiff a sense of false security in the use of

his suite of rooms in the Sheraton-Carlton Hotel; after the removal of said listening device referred to above, said defendants, in furtherance of said conspiracy, did conceal from Plaintiff the fact that said device had been installed and that said trespass and invasion of his privacy and Constitutional rights had taken place, and have continued to conceal said facts from Plaintiff up to and including the date of this Complaint, all to the injury of Plaintiff as hereinafter set forth.

23. As a result of said conspiracy between defendants Sheraton Corporation of America and Washington Sheraton Corporation and said third parties and said wrongful trespass upon the suite of Plaintiff at the Sheraton-Carlton Hotel and said wrongful invasion of the privacy and Constitutional rights of Plaintiff, the concealment thereof and the subsequent revelation thereof, Plaintiff has suffered great mental anguish and pain, embarrassment, and humiliation, including the alienation of the affections of his family, the loss of friends and business associates, public ridicule and humiliation, and the loss of his good name and standing in the community; in addition, Plaintiff has suffered great pecuniary loss, including the destruction of his means of livelihood and the loss of his income.

24. Wherefore, Plaintiff demands judgment against defendants Sheraton Corporation of America and Washington Sheraton Corporation in the sum of One Million Dollars (\$1,000,000) compensatory damages and Three Million Dollars (\$3,000,000) punitive damages.

COUNT FIVE

25. The claim against the United States arises under the Act of August 2, 1946, 60 Stat. 843; U. S. C. Title 28 §§1346(b), 2671 et. seq.,

commonly known as the Federal Tort Claims Act, as hereinafter more fully appears.

26. Plaintiff repeats and realleges the allegations of paragraphs 1, 8, and 10 of Count One with the same force and effect as if said paragraphs were here fully set out.

27. On or about February 7, 1963, certain employees of Defendant United States, to wit: Carlton Giovanetti, Phillip M. King, William B. Sloan, H. Branch Wood, Robert Shakelford, Charles Shores, and others whose names are not presently known to Plaintiff, agents of the Federal Bureau of Investigation, in the course of an investigation and incident to their employment, consistent with and pursuant to the authorization and instructions of their superiors, did wrongfully trespass upon the suite of Plaintiff in the Sheraton Carlton Hotel and did wrongfully invade the privacy and Constitutional rights of Plaintiff by placing an electronic listening device, commonly known as a spike-mike, through the wall between an adjoining room and Plaintiff's suite, and into said suite, and, by means of such device and/or others did listen to, monitor, transmit, and record the private, personal conversations and business transactions of Plaintiff and his guests continuously for three months, did conceal from Plaintiff the presence of said listening device until it was removed on April 25, 1963, and thereafter did conceal from Plaintiff the fact that said listening device had been installed, until the facts regarding such listening device were publicly disclosed by Defendant United States in June, 1966, all to the injury of Plaintiff as hereinafter set forth.

28. As a result of said wrongful trespass upon the suite of Plaintiff in the Sheraton-Carlton Hotel, said wrongful invasion of the

privacy and Constitutional rights of Plaintiff, said wrongful concealment thereof by said employees of Defendant United States, and said subsequent revelation thereof, Plaintiff has suffered great mental anguish and pain, embarrassment and humiliation, including the alienation of the affections of his family, the loss of friends and business associates, public ridicule and humiliation, and the loss of his good name and standing in the community; in addition, Plaintiff has suffered great pecuniary loss, including the destruction of his means of livelihood and the loss of his income.

29. Wherefore, Plaintiff demands judgment against Defendant United States in the sum of One Million Dollars (\$1,000,000) compensatory damages.

COUNT SIX

30. The claim against the United States arises under the Act of August 2, 1946, 60 Stat. 843; U.S.C. Title 28 §§1346(b), 2671 et. seq., commonly known as the Federal Tort Claims Act, as hereinafter more fully appears.

31. Plaintiff repeats and realleges the allegations of paragraphs 1, 8, and 10 of Count One with the same force and effect as if said paragraphs were here fully set out.

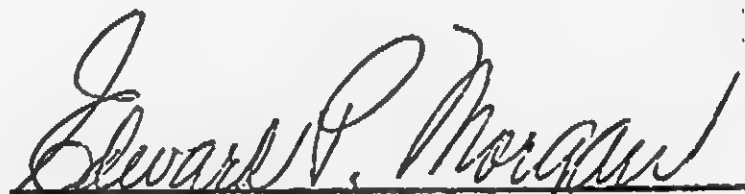
32. On or about February 7, 1963, certain employees of Defendant United States, to wit those named in paragraph 27 above and others whose names are not presently known to Plaintiff, agents of the Federal Bureau of Investigation, in the course of an investigation and incident to their employment, consistent with and pursuant to the authoriza-

tion and instructions of their superiors, did conspire with defendants Sheraton Corporation of America and Washington Sheraton Corporation to wrongfully trespass upon the suite of Plaintiff at the Sheraton-Carlton Hotel and to invade the privacy and Constitutional rights of Plaintiff; pursuant to said conspiracy and in furtherance thereof, said employees of Defendant United States, aided and abetted by defendants Sheraton Corporation of America and Washington Sheraton Corporation, in the course of their employment, consistent with and pursuant to the authorization and instructions of their superiors, did wrongfully trespass upon the suite of Plaintiff and invade the privacy and Constitutional rights of Plaintiff for three months, as set forth in detail in paragraph 27 above; pursuant to said conspiracy and in furtherance thereof said employees of Defendant United States and other such employees and defendants Sheraton Corporation of America and Washington Sheraton Corporation did wrongfully conceal from Plaintiff any and all information and evidence pertaining to the presence of said listening device during February, March, and April of 1963, until such listening device was removed on or about April 25, 1963, and thereafter did wrongfully conceal from Plaintiff any and all information and evidence that said listening device had been installed, until the facts regarding such listening device were made public in June, 1966, by Defendant United States, all to the injury of Plaintiff as hereinafter set forth.

33. As a result of said wrongful conspiracy, said wrongful trespass upon the suite of Plaintiff in the Sheraton-Carlton Hotel, said wrongful invasion of the privacy and Constitutional rights of Plaintiff,

said wrongful concealment thereof by said employees of Defendant United States, and said subsequent revelation thereof, Plaintiff has suffered great mental anguish and pain, embarrassment and humiliation, including the alienation of the affections of his family, the loss of friends and business associates, public ridicule and humiliation, and the loss of his good name and standing in the community; in addition, Plaintiff has suffered great pecuniary loss, including the destruction of his means of livelihood and the loss of his income.

34. Wherefore, Plaintiff demands judgment against Defendant United States in the sum of One Million Dollars (\$1,000,000) compensatory damages.


Edward P. Morgan
Attorney for Plaintiff

Welch & Morgan
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900 Seventeenth Street, N. W.
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Hans A. Nathan
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Washington, D. C. 20006
Of Counsel

February 24, 1967

[Caption Omitted in Printing]

A N S W E R

The defendant, United States of America, by its undersigned attorneys, for its answer, admits, denies, and alleges as follows:

First Defense

The Complaint herein fails to state a claim against the defendant United States of America upon which relief can be granted.

Second Defense

The first four counts of the Complaint seek no relief against the United States of America and are not applicable to the United States of America. Therefore, no response to them by this defendant is necessary. However, if a response is deemed necessary, defendant denies all of the allegations in the said counts except as they are admitted or qualified in the subsequent paragraphs of this Answer.

With Respect to the Fifth Count:

25. Paragraph 25 is a legal conclusion to which no response is necessary.

26. Defendant does not have sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint which is incorporated by reference in Paragraph 26 of the Complaint and therefore denies said allegations. The defendant United States of America admits that the plaintiff was a guest at the Sheraton-Carlton Hotel during

the period February 7, 1963 to April 25, 1963 and for a period of time prior and subsequent to those dates. Defendant does not have sufficient knowledge or information upon which to form a belief as to the truth of the remaining allegations contained in Paragraph 8 which are incorporated by reference in Paragraph 26 and the defendant therefore denies said allegations. Answering Paragraph 10 of the Complaint which is incorporated by reference in Paragraph 26 of the Complaint, defendant denies all of the allegations contained in Paragraph 10 except those that are admitted or qualified as follows. Defendant admits that the electronic surveillance which is the subject of this action was disclosed in the Supreme Court in June 1966, and that the plaintiff was not at any time prior thereto informed by this defendant that the electronic surveillance had occurred. Defendant does not have sufficient knowledge or information upon which to form a belief as to the truth of the allegations that the plaintiff neither knew nor in the exercise of due diligence could have known about said electronic surveillance before the Supreme Court disclosure in June 1966, and therefore denies said allegations.

27. Defendant denies all of the allegations contained in Paragraph 27 of the Complaint except those that are admitted or qualified as follows. This defendant admits that under Departmental practice in effect for a period of years prior to 1963, and continuing into 1965, the Director of the Federal Bureau of Investigation was given authority to approve the installation of devices such as that in question for intelligence (and not evidentiary)

purposes when required in the interest of internal security or national safety, including organized crime, kidnappings and matters wherein human life might be at stake. Defendant further admits that acting on the basis of the aforementioned Departmental authorization, the Director approved installation of the device involved in the instant case. Defendant further admits that pursuant to this approval, its employees whose names are set out in the first sentence of Paragraph 27, and others, agents of the Federal Bureau of Investigation acting within the scope of their employment, conducted an electronic surveillance of plaintiff's hotel suite from February 7, 1963 to April 25, 1963 by placing a listening device in a common wall between plaintiff's suite and an adjoining room, which penetrated one quarter of an inch into plaintiff's side of the common wall. Defendant further admits that this activity was first disclosed by this defendant in the United States Supreme Court in June 1966.

28. The defendant denies the allegations contained in Paragraph 28 and specifically denies that the plaintiff has been injured or has suffered damages in any amount.

29. The defendant United States of America denies that the plaintiff is entitled to judgment in the sum of \$1,000,000 or, to any judgment in any sum.

With Respect to the Sixth Count:

30. Paragraph 30 is a legal conclusion to which no response is necessary.

31. The defendant United States of America repeats and realleges all of the allegations of Paragraph 26 of

the Answer with the same force and effect as if said paragraph was here fully set out.

32. Defendant denies all of the allegations contained in Paragraph 32 of the Complaint except those that are admitted or qualified in this paragraph of the Answer, and specifically denies that there was any conspiracy between the Sheraton Hotel Corporations and agents of the United States of America. Defendant refers to and incorporates herein Paragraph 27 of this Answer above with the same force and effect as if said paragraph was here fully set out. Defendant further alleges that the agents of the United States of America in carrying out the activities set forth in Paragraph 27 above received some assistance from confidential informants whose identity may not be disclosed.

33. Defendant denies the allegations contained in Paragraph 33 and specifically denies that the plaintiff has been injured or has suffered damages in any amount.

34. The defendant United States of America denies that the plaintiff is entitled to judgment in the sum of \$1,000,000 or, to any judgment in any sum.

Third Defense

Any claim stated in the Complaint accrued more than two years prior to the commencement of this action and is therefore barred by the provisions of Title 28 U.S.C. 2401(b).

Fourth Defense

Some portions of the claim attempted to be set out in the Complaint are barred by those provisions of Title 28 U.S.C. 2680(h) which bar claims based upon misrepresentation or deceit or interference with contract rights.

Fifth Defense

The Court lacks jurisdiction of the subject matter insofar as the Complaint herein may purport to allege an independent right to recovery against the United States based upon any alleged violation of constitutional rights.

WHEREFORE, defendant prays that the Complaint be dismissed and that costs be taxed against the plaintiff.

Edwin L. Weisl, Jr.

EDWIN L. WEISL, JR.
Assistant Attorney General
Civil Division

Joseph M. Hannon

JOSEPH M. HANNON
Assistant United States Attorney
for the District of Columbia

Melford O. Cleveland

MELFORD O. CLEVELAND
Attorney, Department of Justice

Neil R. Peterson

NEIL R. PETERSON
Attorney, Department of Justice

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ANSWER OF DEFENDANTS, SHERATON CORPORATION OF
AMERICA AND WASHINGTON SHERATON CORPORATION,
AND CROSS-CLAIM AGAINST DEFENDANT,
UNITED STATES

First Defense

The complaint fails to state a claim upon which relief can be granted against either of the defendants, Sheraton Corporation of America (hereinafter called "Sheraton") and Washington Sheraton Corporation (hereinafter called "Washington Sheraton").

Second Defense

The matters complained of in all counts of the complaint directed to defendants, Sheraton and Washington Sheraton, did not accrue within three (3) years next before the commencement of this action and are therefore barred by the applicable statute of limitations.

Third Defense

Defendants, Sheraton and Washington Sheraton, answer the several enumerated paragraphs of Counts 1 through 4 of the complaint as follows and aver that Counts 5 and 6 of the complaint and the allegations thereof are not directed at these defendants and do not require response by these defendants:

1. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1.

2. The allegations of paragraph 2 are admitted.

3. The allegations of paragraph 3 are admitted.

4. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

5. Defendant, Washington Sheraton, admits that it owned and operated a hotel known as the "Sheraton Carlton Hotel" located at 16th and K Streets, N. W., in the District of Columbia during the period from February 7, 1963, to April 25, 1963. The remainder of the allegations of paragraph 5 are denied.

6. Defendant, Sheraton, denies that it was or is in the innkeeping business and denies all the allegations of paragraph 6 insofar as they purport to be applicable to this defendant. Defendant, Washington Sheraton, admits that it is in the innkeeping business and in consideration of the payment of stated rates provides food, lodging and related services but denies the remaining allegations of paragraph 6 and to the extent plaintiff alleges a duty owed by this defendant not required by law, such allegation is denied.

7. The allegations of paragraph 7 are denied.

8. These defendants admit that plaintiff was a registered occupant of rooms at the Sheraton Carlton Hotel for a period of years prior to and until May, 1966, including the period February 7, 1963, to April 25, 1963, and paid defendant, Washington Sheraton, consideration in return for the room or rooms being occupied by the plaintiff from time to time but aver that

they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 8.

9. The allegations of paragraph 9 are denied.

10. To the extent the allegations of paragraph 10 of the complaint allege willful, malicious, fraudulent or other wrongful conduct by these defendants, such conduct is denied and with respect to the remainder of the allegations these defendants are without knowledge or information sufficient to form a belief as to their truth.

11. The allegations of paragraph 11 are denied.

12. The allegations of paragraph 12 are a prayer for relief to which no answer is required.

13. These defendants repeat and incorporate herein by reference the responses to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 10 of the complaint with the same force and effect as if herein set forth in full.

14. The allegations of paragraph 14 are denied.

15. The allegations of paragraph 15 are denied.

16. The allegations of paragraph 16 are a prayer for relief to which no answer is required.

17. These defendants repeat and incorporate herein by reference the responses to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 10 of the complaint with the same force and effect as if herein set forth in full.

18. The allegations of paragraph 18 are denied.

19. The allegations of paragraph 19 are denied.

20. The allegations of paragraph 20 are a prayer for relief to which no answer is required.

21. These defendants repeat and incorporate herein by reference the responses to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 10 of the complaint with the same force and effect as if herein set forth in full.

22. The allegations of paragraph 22 are denied, including the allegations of paragraph 9 incorporated therein.

23. The allegations of paragraph 23 are denied.

24. The allegations of paragraph 24 are a prayer for relief to which no answer is required.

All allegations of the complaint with respect to these defendants not specifically admitted herein, are denied.

Fourth Defense

The injuries and damages of plaintiff, if incurred, were solely the result of actions of officers or agents of the United States and other persons without the knowledge, actual or constructive, or complicity of these defendants. If any persons otherwise employees or agents of defendants, Sheraton or Washington Sheraton, committed any wrongful acts, at such times and in doing so, such persons were employees or agents of the United States and not of defendants, Sheraton or Washington Sheraton.

Fifth Defense

Defendant, Sheraton, denies that it was an innkeeper or had any other relationship whatsoever with plaintiff at any time material to the complaint.

Sixth Defense

Defendants, Sheraton and Washington Sheraton, aver that they performed all obligations which they may have owed to plaintiff, as innkeepers or otherwise.

Seventh Defense

Defendants, Sheraton and Washington Sheraton, are not responsible or liable for any actions occurring at the behest or under the direction of officers and agents of the United States, being immune by virtue of any such participation or direction by said officers and agents.

WHEREFORE, defendants, Sheraton Corporation of America and Washington Sheraton Corporation, demand that the complaint of the plaintiff herein be dismissed as to them and that they have judgment for the costs of this action.

CROSS-CLAIM AGAINST DEFENDANT,
UNITED STATES OF AMERICA, FOR INDEMNITY

1. Sheraton Corporation of America is a corporation organized and existing under the laws of the State of New Jersey (hereinafter referred to as "Sheraton"), and Washington Sheraton

Corporation is a corporation organized and existing under the laws of the State of Delaware (hereinafter, "Washington Sheraton"). Both said corporations are authorized and licensed to do business in the District of Columbia.

2. Prior to and from February 7, 1963, and at all material times since, defendant, Washington Sheraton, owned, operated, managed and controlled the Sheraton-Carlton Hotel, located at 16th and K Streets, N. W., in the District of Columbia. Plaintiff herein, Fred B. Black, Jr., occupied certain rooms at the Sheraton Carlton Hotel, among other times, between the period February 7, 1963, to April 25, 1963.

3. Fred B. Black, Jr., plaintiff herein, claims that from on or about February 7, 1963, to and including April 25, 1963, while he occupied rooms at the Sheraton-Carlton Hotel, certain employees of the defendant, United States, wrongfully trespassed upon the plaintiff's suite in the Sheraton-Carlton Hotel, invaded the privacy of the plaintiff and engaged in other wrongful activities and conspiracies, as a result of which the plaintiff suffered personal injuries, damages and losses.

4. Plaintiff, Fred B. Black, Jr., claims that said employees of the defendant, United States, at the same time and place committed such trespass, invasion of privacy and other wrongful activities, causing the injuries, losses and damages alleged, in such fashion and under circumstances that defendants and cross-claimants herein, Sheraton and Washington Sheraton, are liable to plaintiff for plaintiff's injuries, losses and damages resulting from the actions of said employees of the United States.

By virtue of the foregoing alleged facts, cross-claimants, Sheraton and Washington Sheraton, may be liable for all or part of the claims in the action asserted against the cross-claimants.

5. If the said plaintiff, Fred B. Black, Jr., suffered the injuries, losses and damages alleged as a result of the acts of employees of the United States as alleged, said injuries, damages and losses were solely caused by the wrongful acts of employees and agents of the defendant, United States, as named in the complaint of Fred B. Black, Jr., or other employees and agents unknown to cross-claimants, at the times and places heretofore alleged, acting within the scope of their employment, without fault, negligence or knowledge of defendants and cross-claimants, Sheraton and Washington Sheraton, their officers, agents, servants and employees.

6. If as a result of the matters alleged in the complaint the defendants and cross-claimants, Sheraton and Washington Sheraton, are held liable to the plaintiff, Fred B. Black, Jr., for all or part of such injury, loss or damage as he may have sustained, then the United States is the party primarily liable for said loss, injury or damage, and is liable under the Act of August 2, 1946, 60 Stat. 843; 28 U.S.C. §§1346(b), 2671-2680 (known as the Federal Tort Claims Act), to indemnify said cross-claimants for all such loss or damage as they may suffer and said cross-claimants assert in this action their right to such indemnity, or in the alternative to contribution.

7. Even if officers, agents, servants or employees of defendants and cross-claimants, Sheraton and Washington Sheraton, had knowledge of or did any of the wrongful acts alleged in the

complaint herein, said officers, agents, servants or employees were wrongfully induced at or about the times set forth in paragraph 3 by threats, promises of rewards or other means not revealed to cross-claimants to breach their duties to the cross-claimants, which wrongful inducing was done by agents or employees of the Federal Bureau of Investigation while acting within the scope of and pursuant to their employment. As a result of said wrongful acts of the agents or employees of the Federal Bureau of Investigation, if any there were, the defendant, United States is liable to the cross-claimants under the aforesaid Act of August 2, 1946, and said cross-claimants assert in this action their right to indemnity, for all injuries, damages and losses claimed by the plaintiff which may be recovered of the cross-claimants as defendants.

WHEREFORE, defendants, Sheraton and Washington Sheraton, demand:

(1) A judgment dismissing the complaint of the plaintiff herein against them, together with the costs of this action, or

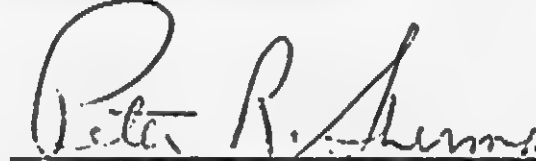
(2) Judgment that if there is any liability to the plaintiff herein, that the defendant, United States, is solely liable to the plaintiff; and

(3) In the event a verdict is recovered by plaintiff against defendants, Sheraton and Washington Sheraton, judgment that defendant, United States, is primarily liable therefor and that defendants, Sheraton and Washington Sheraton, or either of them, shall have judgment over and against the defendant, United States, for the amount recovered by plaintiff against them, or


either of them, together with the costs of the action, or in the alternative for contribution toward any amount recovered by plaintiff against them, or either of them, together with costs of the action.

SMOLLAR, KUDER & SHERMAN


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298-8588

Attorneys for Defendants,
Sheraton Corporation of America
and Washington Sheraton Corporation.

Of Counsel:

N. Ronald Silberstein
General Counsel
Sheraton Corporation of America
470 Atlantic Avenue
Boston, Massachusetts 02210

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ANSWER OF DEFENDANT, UNITED STATES OF
AMERICA, TO CROSS-CLAIM OF DEFENDANTS,
SHERATON CORPORATION OF AMERICA AND
WASHINGTON SHERATON CORPORATION

FIRST DEFENSE

The Cross-Claim fails to state a claim against the United States upon which relief can be granted.

SECOND DEFENSE

1. The United States admits the allegations of Paragraph 1 of the Cross-Claim.

2. The United States admits the allegations of Paragraph 2 of the Cross-Claim.

3. The United States admits that plaintiff, Fred B. Black, Jr., has made claims in this action which are stated in substance in Paragraph 3 of the Cross-Claim, and incorporates herein as though fully set forth its answers to the complaint of plaintiff, Fred B. Black, Jr., pertaining to the merits of the said claims.

4. The United States admits that plaintiff, Fred B. Black, Jr., has made claims in this action which are stated in substance in the first sentence of Paragraph 4 of the Cross-Claim, and incorporates herein as though fully set forth its answers to the complaint of plaintiff, Fred B. Black, Jr., as any of the said answers pertain to the merits of the said claims. The United States specifically denies that the cross-claimants may be liable for all or part of the claims asserted against them in this action as set forth in the second sentence of Paragraph 4 of the Cross-Claim.

5. The United States is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5 of the Cross-Claim and therefore denies the said allegations. In addition, insofar as the allegations of that Paragraph are conclusory, they require no answer.

6. The United States denies the allegations of Paragraph 6 of the Cross-Claim.

7. The United States denies the allegations of Paragraph 7 of the Cross-Claim.

WHEREFORE, defendant United States of America prays that the Cross-Claim against it be dismissed.

151 NEIL R. PETERSON
NEIL R. PETERSON
Attorney
U.S. Department of Justice
Washington, D.C. 20530

Attorney for the United States

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EXCERPTS FROM DEPOSITION OF
EDWARD W. PENNYPACKER

8 Q Was this communication in writing?

A Yes, it was.

Q To your knowledge, was it the result of a lead obtained from FBI -- from the use of an eavesdropping device by the FBI in Las Vegas?

A I can't answer that question at this time. I am under instruction of the Attorney General not to disclose any information which might tend to identify an FBI informant or confidential informant.

Q And the answer to this question would involve that, I mean, in your opinion?

A Yes, in my opinion, if I were to answer the question it would involve that.

Q Now, with respect to your instructions, do you understand this to refer to eavesdropping devices, do you include them as informants, or are you talking about individual persons?

A With regard to this answer I am referring to individual persons.

Q I see.

9 Would your answer be the same if I asked you the question with respect to eavesdropping devices or to the Sigelbaum bug in Miami? In other words, was it a result of information received from this Sigelbaum microphone?

A My answer would be the same.

Q I see. And this would again involve the identification of an individual informant or informer?

A Yes, sir.

Q A person rather than a device.

32 Q Did you have any contacts with people employed by the Sheraton or in the hotel?

A I have to decline to answer that question on the previous statement that I made that the Attorney General has instructed me not to answer any questions which would tend to identify confidential informants.

Q I didn't ask you in this question for the identity of the informant. I asked you if you had such a contact.

MR. PETERSON: You have your answer, counsel. The witness stands on it.

MR. ROURKE: Well, I would just like to clarify ---

MR. PETERSON: We have admitted in our answer that the FBI received information from confidential informants. You are not going to ascertain from this witness or from any other witness prior to getting an order to that effect from a court of law as to who the informants were or where they were located in any particular organization, whether they were
33 private citizens, whatever kind of identity they had.

MR. ROURKE: Do I understand that to mean you will not answer any questions with respect to an informer or an inside contact in the hotel, Mr. Peterson?

MR. PETERSON: That is correct, counsel.

49 Q I understand that this monitoring operation continued until April 25, is that correct?

A Yes.

Q Now, at that time did you, as the case agent, recommend that the operation be terminated?

A No.

Q You were instructed to terminate it?

50 A Well, there was an interruption in our operation which caused us to stop on a temporary basis, and then reconsider and decide to stop permanently.

Q An interruption of what sort?

A The monitoring position in the hotel was in Room 432. During some time -- now, I'm answering based on information furnished to me by the agents or the agent who was handling the suite-- there was a convention to be held in the hotel, and this room had been committed to the use of this convention prior to our use of the room.

We turned the room back to the hotel at their request, that is, our agent acting under cover, and during that period of time again we had conferences and decided not to reinstitute the microphone surveillance at that time anyway.

Q What was done with the microphone and the wiring in the hotel at that time, at the time you terminated it, the first period of listening?

A May I speak to counsel?

MR. ROURKE: Yes.

THE WITNESS: I have no personal knowledge as to the ultimate disposition of the installation at this time.

BY MR. ROURKE:

Q Did you receive a report or a communication
51 concerning the disposition or the handling of this material?

MR. PRENTICE: Would you define what you mean by "this material"?

MR. ROURKE: The previous question related to the microphone and the wiring.

MR. PRENTICE: Thank you.

THE WITNESS: May I?

BY MR. ROURKE:

Q Yes, go right ahead.

A I got no communication from any individual as to what the ultimate disposition was of the installation.

Q My question was not directed toward the ultimate disposition of it. It was directed toward what was done with it at that time on April 25 when you ceased your monitoring operation. Can you answer that, first?

MR. PRENTICE: You asked him if he got a report?

MR. ROURKE: Yes.

THE WITNESS: I got no report. I don't recall getting any written documents in that regard.

BY MR. ROURKE:

Q No document, no communication with respect to what was done at that time?

A I am saying this is my recollection.

52 Q Was the microphone and the wiring connected with it removed at some time?

A Well, my answer that I previously gave is what I am trying to indicate, that I don't know, and I wasn't given a written report on the matter.

Q I see.

Did you remain the case agent on this case?

A I was the case agent until, I don't recall the date, but a considerable time thereafter.

Q So the investigation in Mr. Black's affairs continued after the ---

A Well, you say the investigation into Mr. Black's affairs. That is a broad field. My investigation continued.

Q Your investigation into whether he was a representative of gambling interests in Las Vegas; is that what you are referring to?

A That, plus the other items, other matters, that I mentioned in terms of criminal intelligence, yes.

Q Would you explain what you mean by other matters of criminal intelligence. I am not sure. Is this an investi-

gation that is not directed toward a particular crime or crimes but merely intelligence?

53 A Well, it is both. The term "criminal intelligence" is one that is, fits a category of cases which were in existence at that time. There were indications in some of these cases, and I have to be broad in this answer, that there were violations of the law that required certain investigation to be conducted, let's say they were allegations of violations of the law or indications of violations of the law, and our responsibility, in our responsibility, we conducted whatever investigation we felt had to be undertaken to determine if a Federal law had or had not been violated.

Q When, or on what date did you cease being the case agent on the investigation of Mr. Black?

A Well, there came a time when the case was closed.

Q Can you tell us when that was?

A I cannot, I am sorry.

Q All right.

A It was subsequently reopened at a date that I don't recall because of the, well, I believe it was because of the hearings to be held in connection with the microphone surveillance, that were held in the District Court.

On or about August 28, 1967, my assignment was changed and, consequently, I was not longer the case agent. I don't recall what the status of the case was at that time.

Q Was it an active case at that time?

54

A I believe it was open only because of the pending hearings that were to be conducted.

Q I see.

So you were the case agent from the time appointed up until August of 1967?

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A That is right.

ROBERT M. JENNINGS, CLERK

Q Did you ever see any communication or information that the microphone had been removed?

A No, I did not.

Q Do you know whether it was removed?

A No, I do not.

[Caption Omitted in Printing]

MOTION TO COMPEL ANSWER TO
QUESTIONS

Comes now the plaintiff, Fred B. Black, Jr., pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, and moves the Court for an order requiring Edward W. Pennypacker, an employee of defendant United States, to answer certain questions propounded to him upon his deposition, which he refused to answer, or for such other relief as may be just. The questions here at issue are whether the FBI contacted anyone at the Sheraton Carlton Hotel in connection with its unlawful electronic surveillance of plaintiff's suite therein, and if so, who that person was.

This motion is made upon the affidavit of Gerald S. Rourke, the transcript of the deposition of Edward W. Pennypacker, and upon the complaint and answers of the parties to this action, copies of which are attached hereto.

Respectfully submitted,

/s/ Edward P. Morgan
Edward P. Morgan

/s/ Gerald S. Rourke
Gerald S. Rourke

January 3, 1969

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AFFIDAVIT

District of Columbia) ss.:

GERALD. S. ROURKE, being first duly sworn, deposes
and says:

1. I am an attorney associated with the firm of Welch & Morgan, attorneys for the plaintiff herein, and make this affidavit in support of plaintiff's motion to compel answers to certain questions propounded to witness Edward W. Pennypacker which he refused to answer.

2. From February 7, 1963, until April 25, 1963, the United States Government, through agents of the Federal Bureau of Investigation, conducted an unlawful around-the-clock electronic surveillance of plaintiff's suite of rooms at the Sheraton Carlton Hotel in Washington, D. C., recording and/or transcribing all conversations and activities which took place therein. By this lawsuit plaintiff seeks damages from the United States, the Sheraton Corporation of America, and the Washington Sheraton Corporation for invasion of privacy, trespass, and violation

of Constitutional rights in connection with that surveillance. A copy of the complaint is attached hereto as Exhibit 1.

3. In its Answer the United States admits that its agents conducted said surveillance and that the listening device "penetrated one quarter of an inch into plaintiff's side of the common wall";* but denies that plaintiff was injured or suffered any damages thereby. A copy of the answer of defendant United States is attached hereto as Exhibit 2.

4. The Sheraton defendants in their answer deny the allegations of the complaint or deny knowledge or information sufficient to form a belief as to them, and raise a cross-claim against defendant United States for indemnity or contribution in the event they are held liable to the plaintiff. A copy of the answer of the Sheraton defendants is attached hereto as Exhibit 3.

5. On November 22, 1968, plaintiff, by the undersigned, took the deposition of Edward W. Pennypacker, the FBI agent in charge of the investigation of which the electronic surveillance at issue herein was a part. The transcript of this deposition is submitted herewith as Exhibit 4.**

6. In the course of his examination Mr. Pennypacker refused to answer a number of questions propounded to him on a variety of subjects, stating that he was "under instructions of the Attorney General not to dis-

* Before the United States Supreme Court the Government admitted that the listening device, a microphone, "extended through the six inch common wall and one-fourth of an inch into the one-half inch molding of" plaintiff's suite. (Emphasis added.) Supplemental Memorandum For the United States, p. 2 (unreported); United States Supreme Court, No. 1029, October term 1965; see Black v. United States, 385 U.S. 26, 87 S.Ct. 190, 17 L. Ed. 2d 26 (1966).

**This transcript is subject to the Protective Order Re Discovery entered herein on December 13, 1968.

close any information which might tend to identify an FBI informant or confidential informant." (Deposition, p. 8.)

7. Among the subjects about which Mr. Pennypacker refused to testify was the part played by the Sheraton co-defendants in the surveillance of plaintiff's suite. Mr. Pennypacker refused to answer even the threshold question whether the FBI had contacted anyone at the hotel in connection with this surveillance (Depo., pp. 32-34). Thus, necessarily, the question of who was contacted was never reached. In addition, on the advice of Government counsel, Mr. Pennypacker refused to answer all questions as to whether there is any factual basis in this case for any claim of privilege on the part of the Government. In response to the question whether disclosure of the name of an "informant" in this case would endanger the life of such person, Government counsel stated:

"I am instructing the witness not to answer that question on the ground that since I assume you will be taking the matter to court anyhow there will be a full revelation there concerning the background of the claim of privilege and what various factors affect the claim of it in this particular case." (Deposition, p. 58.)

8. It appears from the transcript of his testimony that Mr. Pennypacker may have been protecting more than one so-called "confidential informant" in refusing to answer questions. Some of the questions which he refused to answer have no apparent connection with the Sheraton Carlton Hotel, and from his references to "informants" (Deposition, p. 35), it appears that in addition to someone at the Sheraton Carlton there may be one or more other persons involved in this case whose identity the Government does not wish to disclose. Accordingly,

in the interest of orderly proceedings, plaintiff in this motion is narrowing the issue to the question of the identity of the person or persons involved who are connected with the Sheraton Carlton Hotel. By so doing plaintiff in no way waives his right to inquire further into any other matters which are raised in the deposition of Mr. Pennypacker or are otherwise present in this case, including the question of the identity of any other "confidential informant" who may be involved.

9. The relevance to this case of the subject on which Mr. Pennypacker has refused to testify is apparent from the pleadings. Indeed, the existence and identity of a person connected with the Sheraton Carlton Hotel who was involved in this surveillance may well be determinative of the liability of the Sheraton defendants to the plaintiff.

10. In view of the Government's reliance upon the Justice Department regulations issued under the housekeeping statute, 5 USC §301, there is attached hereto a subpoena addressed to the Attorney General of the United States, requiring him to appear and give testimony concerning the matters on which Mr. Pennypacker has refused to testify. Plaintiff stands ready to effect service upon the Attorney General or to make whatever formal demand is required to obtain the information at issue herein.


/s/ Gerald S. Rourke
Gerald S. Rourke

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POINTS AND AUTHORITIES
IN SUPPORT OF
MOTION TO COMPEL ANSWER

ROBERT M. STEARNS, CLERK

* * *

In view of the Government's refusal to permit Mr. Pennypacker to testify at all with respect to the basis for the Government's claim of privilege herein, plaintiff requests an evidentiary hearing on this question at which an opportunity will be afforded for cross examination of the Government witnesses.

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MOTION FOR DISCOVERY AND
PRODUCTION OF DOCUMENTS

ROBERT M. STEARNS, Clerk

Plaintiff Fred B. Black, Jr., by his attorneys, hereby moves the Court under Rule 34 of the Federal Rules of Civil Procedure for an order requiring defendant United States to produce for inspection and copying by the plaintiff each of the following:

1. All logs, recordings, transcripts, memoranda, notes, reports, communications, writings, and documents of any sort:
 - (a) containing, either verbatim, in summary, or in substance, any conversation or statement overheard by government agents in the course of the government's microphone surveillance of plaintiff's suite at the Sheraton-Carlton Hotel during 1963.
2. All communications, reports, memoranda, notes, records, record entries, writings and documents of any sort:

- (a) containing or relating to any and all requests for permission for, or approval of, the installation of the microphone involved in this surveillance.
- (b) containing or relating to any and all authorizations or grants of approval for the installation of said microphone.
- (c) concerning or relating to preparations for the installation of said microphone and the conducting of said surveillance, including but not limited to any arrangements with hotel personnel, renting of the rooms involved, obtaining the floor plan of plaintiff's rooms, and obtaining the necessary equipment and instruments.
- (d) concerning or relating to the installation of said microphone and the conducting of said surveillance.
- (e) concerning or relating to the transfer of the listening station from rooms 436-434 to room 432, and any and all preparations therefor.
- (f) concerning or relating to the termination of the surveillance of plaintiff's suite.
- (g) concerning or relating to the wiring between rooms 436-434 and room 432 and the apparatus connected therewith, including but not limited to all references to the leaving in place or removal thereof.
- (h) concerning or relating to the microphone installed in the wall of plaintiff's suite and the apparatus connected

therewith, including but not limited to references to the leaving in place or the removal thereof.


(i) authorizing, relating to, or reflecting the payment of funds for the rental of rooms 436-434 and/or room 432 at the Sheraton-Carlton Hotel in connection with the microphone surveillance of plaintiff's suite.

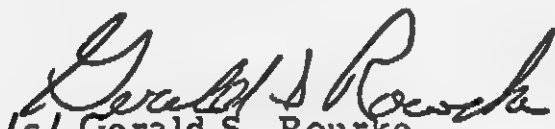
(j) authorizing, relating to, or reflecting the payment of any funds to or on behalf of or for the benefit of or in connection with the use of any confidential contact at the Sheraton-Carlton Hotel in connection with the microphone surveillance of plaintiff's suite.

(k) requesting, authorizing or instructing the Washington Field Office of the FBI to undertake an investigation into the activities of the plaintiff, or on the basis of which such investigation was undertaken.

(l) concerning or relating to any confidential inside contact at the Sheraton-Carlton Hotel utilized in any way in connection with the microphone surveillance of plaintiff's suite.

Respectfully submitted,


/s/ Edward P. Morgan
Edward P. Morgan


/s/ Gerald S. Rourke
Gerald S. Rourke

300 Farragut Building
900-17th Street, N. W.
Washington, D. C. 20006

January 24, 1969

WELCH & MORGAN
Attorneys for Plaintiff

FILED

FEB 20 1960

[Caption Omitted in Printing]

MEMORANDUM OF THE UNITED STATES IN
OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL ANSWER
TO QUESTIONS AND TO PLAINTIFF'S MOTION FOR DISCOVERY
AND PRODUCTION OF DOCUMENTS

* * *

[Caption Omitted in Printing]

FILED

FEB 20 1960

District of Columbia) ss:

John N. Mitchell, being duly sworn, deposes and states
as follows:

1. I am the Attorney General of the United States, and
I make this affidavit in support of the opposition of the
United States to Plaintiff's Motion to Compel Answers and his
Motion for Production of Records in the above action.

2. I make this affidavit upon my personal knowledge and upon the basis of information contained in the official files of the United States Department of Justice. I have reviewed the pleadings of record to date in this action, the deposition of Special Agent Edward W. Pennypacker taken on November 22, 1968, and the affidavits of Special Agent Pennypacker and Cartha D. DeLoach, Assistant to the Director, Federal Bureau of Investigation, both also submitted in support of the opposition of the United States to Plaintiff's Motions.

3. Special Agent Pennypacker was instructed by the then Attorney General to refuse to disclose at his deposition to be taken on November 22, 1968 any information which would disclose or tend to disclose the identity of confidential informants of the Federal Bureau of Investigation, since non-disclosure of the identity of confidential informants is deemed to be of paramount public interest. These instructions were issued under the authority of Sections 16.11-16.14 of Title 28 of the Code of Federal Regulations, and remain in effect.

4. A review of the transcript of the deposition of Special Agent Pennypacker indicates that plaintiff is attempting to compel the witness to disclose, directly or indirectly, information which would reveal the identity of a confidential informant.

5. Confidential informants perform a most essential and useful service in the prevention and detection of crime. They also enable federal law enforcement officers to show good cause for the issuance of search warrants, and warrants for the installation of wire taps under the authority of Title III of

the Omnibus Crime Bill, in cases involving national security, organized crime and racketeering.

6. As noted by the affidavit of Mr. DeLoach, Assistant to the Director of the FBI, confidential informants are the single most important source of information in the field of law enforcement. To lose the assistance given by confidential informants would seriously impair the effectiveness of law enforcement agencies, and immeasurably increase the burden of crime control.

7. In my judgment the damage to the public interest which would result from a disclosure of the identity of confidential informants far outweighs the plaintiff's individual interest in this action, and I have directed the witness to respectfully decline to furnish such information.


[Jurat Omitted in Printing]

District of Columbia) ss:

Cartha D. DeLoach, being duly sworn, deposes and states
as follows:

1. I am Assistant to the Director, Federal Bureau of Investigation, United States Department of Justice, and I make this affidavit in support of the opposition of the United States to Plaintiff's Motion to Compel Answers and Motion for Production of Records in the above action.

2. I make this affidavit upon my own personal knowledge, upon the review of files of the Federal Bureau of Investigation, and upon my knowledge of the policies of the Federal Bureau of Investigation. I am familiar with the pleadings of record in

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FEB 20 1969

this action to date, I have reviewed the transcript of the deposition of Special Agent Edward W. Pennypacker taken on November 22, 1968, and I have reviewed the affidavit of Special Agent Edward W. Pennypacker also submitted in support of the opposition of the United States to Plaintiff's motions.

3. The FBI is the statutorily created investigative arm of the United States Department of Justice. Part of its statutory authority and responsibility is to investigate crimes against the United States. It performs those functions in the areas of national security, certain felonies, organized crime and racketeering, and certain kidnappings, among others.

4. In the course of an investigation, it is imperative to develop the actual facts of a given case with as much thoroughness and specificity as possible. The development of such factual information requires utilization of a broad spectrum of investigative techniques. One of the traditional, most widely used and most effective of such investigative techniques is that involving what are generally termed confidential informants.

5. Confidential informants are used by the agents of the FBI to secure and report information relating to the commission or possible commission of crimes, being of great assistance in both the prevention, detection and investigation of criminal activity.

6. The usefulness of confidential informants is dependent upon their ability to conceal their assistance to law enforcement officers. To secure and to prepare a confidential informant for service may take months or even years of patient work. In

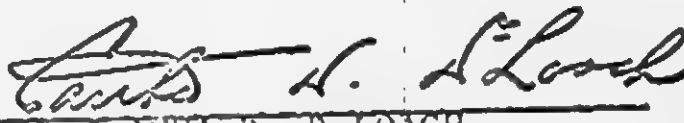
each and every case the confidential informant must be and is assured that his identity will not be revealed. For disclosure in some instances may endanger the informant's life, his job or his business.

7. From a review of the deposition of Special Agent Edward W. Pennypacker taken on November 22, 1968, and from a review of Plaintiff's Motions to Compel Answers and to Produce Documents it is apparent that plaintiff is endeavoring to learn the identity of a confidential informant of the FBI who was involved in the investigation of Fred B. Black, Jr. There are a number of reasons why the identity of this informant should not be revealed. First, revealing his identity would destroy his value as an informant. Second, revealing the identity of one of Special Agent Pennypacker's informants would seriously impair Special Agent Pennypacker's ability to develop other informants in other investigations, and would seriously impair his relationship with other informants he has already developed in other investigations, and thus would detrimentally affect his operation as Special Agent of the Federal Bureau of Investigation. Third, such a disclosure would adversely affect the ability of all agents of the Federal Bureau of Investigation to develop and maintain their relationships with their informants, thus detrimentally affecting their operation as agents. Fourth, the disclosure of the identity of an informant would thus detrimentally affect the availability of one of the most effective criminal investigative techniques, that of using confidential informants, and would thus adversely affect the ability of the FBI to discharge its statutory authorization and duty to investigate crimes.

8. The magnitude of the importance of confidential informants is apparent from the following statistics. Confidential informants assisted in or supplied information in directly locating 4,080 subjects in fiscal year 1965, 5,284 in fiscal year 1966, and 5,864 in fiscal year 1967. In the same three fiscal years information or assistance received from confidential informants directly resulted in the recovery of stolen merchandise in excess of \$33,000,000. These figures both pertain strictly to FBI cases. Confidential informants, without their identities as such being revealed, also furnished assistance or information which was passed along to other local and Federal law enforcement agencies in those same three fiscal years which directly resulted in the locating of 16,000 subjects and recovering over \$20,000,000 in stolen and contraband merchandise. The locating of a subject means his arrest on a criminal charge in all but a very small percentage of the cases. These figures do not include the thousands of cases in which confidential informants gave assistance or information and in which no arrest has or has yet resulted.

9. From the above, it is readily apparent that the confidential informant investigative technique as employed by the Federal Bureau of Investigation is of paramount importance in the effective enforcement of the laws of the United States. There is no other single investigative technique employed by the Federal Bureau of Investigation which furnishes so much critical assistance and information in the prevention, detection and investigation of criminal activity. The importance of protecting identity of confidential

informants cannot be over-emphasized. If disclosure were made the most important technique now employed in the fight against crime would be destroyed, and the ability of the law enforcement agencies to perform their assigned duties seriously impaired.


CARTHA D. DeLOACH

[Jurat Omitted in Printing]

[Caption Omitted in Printing]

District of Columbia) ss:

Edward W. Pennypacker, being sworn, deposes and states as follows:

1. I am a Special Agent of the Federal Bureau of Investigation, United States Department of Justice, assigned to the Washington Field Office, and I make this affidavit in support of the opposition of the United States to Plaintiff's Motion to Compel Answers and Motion for Production of Records in the above action.

2. I was also a Special Agent at all times relevant to the allegations of the Complaint in the above action, and during those times I was the Case Agent for an investigation of Fred B. Black, Jr., by the Federal Bureau of Investigation. I make this affidavit upon my personal knowledge and upon the basis of a review of the investigative file pertaining to the Fred B. Black, Jr. investigation.

3. The investigation of Fred B. Black, Jr. by the Washington Field Office of the FBI was undertaken to determine whether he had violated or was then violating any of the laws of the United States.

4. As part of this investigation of Fred B. Black, Jr., I developed a specific informant to assist me in gathering information.

5. The informant in question was requested by me to obtain and did obtain certain types of information pertaining to Fred B. Black, Jr., and was requested to and did render certain assistance to me as an FBI Agent in the course of that investigation. However, neither the information received nor the assistance provided can be revealed publicly without revealing or tending to reveal the identity of the informant.

6. During my initial approaches to the informant as a part of securing his services and assistance, I assured him that any information or assistance he gave would be treated in the strictest confidence and that his part in the investigation would never be revealed. It is customary for me to make such an assurance to any informant with whom I have contact. I have learned from my past experience as an FBI Agent that no information or assistance is furnished without such an assurance. I personally know for a fact that the informant in question would be subject to economic injury at the very least if his identity had been disclosed. Furthermore, if the identity were to be disclosed, there is a potential for other typical types of reprisals against him, including black listing in his occupation, harrassment at his home and at work, and danger to his person.

7. The informant undoubtedly deduced, from the nature of the information and assistance I requested, that Fred B. Black, Jr. was being investigated by the FBI, but the informant did not know the true reason for the investigation, the nature

of the investigation, or its extent. Nor did he know that a microphone surveillance of the suite of Fred B. Black, Jr. in the Sheraton-Carlton Hotel in Washington, D. C. was being conducted, since neither I nor any other FBI employee told him so, and since he would have had absolutely no opportunity or occasion to ascertain this information on his own.

8. This informant also has assisted me in other investigations, as well as in the present case, always voluntarily and without compensation of any kind.

9. It is part of my job to develop and use confidential informants, and several have given me information at the risk of imperilling their lives. My relationship with my informants will be placed in jeopardy if the identity of any one of them is disclosed by me or any other employee of the Federal Government, and the performance of my assigned duties consequently would be adversely affected. Furthermore, the relationship of other FBI agents with their confidential informants would likewise suffer if the identity of my informant is revealed.


EDWARD W. PENNEY

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FILED

JUN 6 1969

ORDER

The Court having before it for consideration at the present time various motions of the plaintiff and the United States which all deal essentially with the question of the existence, identity and activities of a confidential informant of the Federal Bureau of Investigation whom plaintiff alleges was an employee of the two Sheraton defendants in this action, and the United States having offered to submit to the Court for in camera inspection those documents from the files of the Federal Bureau of Investigation which pertain to the identity of the confidential informant and detail the assistance or information which the confidential informant provided to the Federal Bureau of Investigation,

IT IS HEREBY ORDERED that the United States produce to the Court for in camera inspection the following documents from the files of the Federal Bureau of Investigation pertinent to an investigation of Fred B. Black, Jr.:

1. All documents which identify the confidential informant;
2. All documents which contain, detail, state, or summarize any information or assistance which the confidential informant furnished the Federal Bureau of Investigation;
3. All documents which pertain to any contact, meeting or communication between the confidential informant and any member or employee of the Federal Bureau of Investigation; and

IT IS HEREBY FURTHER ORDERED that the United States shall submit to the Court a cover document itemizing and identifying all documents submitted to the Court pursuant to this Order.

The documents themselves which are produced to the Court for an in camera inspection pursuant to this Order are to be returned to the United States prior to the entry of any order or decision on the merits of the claim of the informer's privilege by the United States. The itemized list identifying the said documents will be retained by the Court under seal pending any review of the matter, and upon conclusion of any final review will also be returned to the United States.


UNITED STATES DISTRICT JUDGE

6/6/69

[Caption Omitted in Printing]
MOTION TO MODIFY ORDER

FILED

JUN 19 1969

Comes now the plaintiff Fred B. Black, Jr., by his attorneys, and hereby moves the Court to modify its order entered in the above captioned proceeding on June 6, 1969.

The changes in the order which plaintiff requests the Court to make are as follows:

1. Change the last paragraph of the order to provide that any and all documents submitted to the Court in camera be sealed

and retained by the Court pending review. The order presently provides that only a list of such documents will be retained by the Court.

2. Change paragraph No. 1 to provide for the submission of one document which identifies the alleged informer. The order presently provides for the submission of all documents which identify the alleged informer.

3. Change paragraph No. 2 to limit the documents being submitted to those which pertain to activities of the alleged informer in connection with the eavesdropping on plaintiff's suite at the Sheraton Carlton Hotel. Paragraph No. 2 presently provides for submission of all documents pertaining to any information or assistance furnished by the alleged informer.

4. Change paragraph No. 3 to provide for the submission of all documents which pertain to any contact, meeting or communication concerning or in connection with the eavesdropping on plaintiff's suite at the Sheraton Carlton Hotel between the alleged informer and any agent of defendant United States. Paragraph No. 3 presently provides for the submission of all documents which pertain to any contact, meeting or communication between the alleged informer and any member or employee of the Federal Bureau of Investigation.

5. Add to the order a provision for an evidentiary hearing prior to any in camera examination of documents.

The filing of this motion does not constitute a waiver
or withdrawal of plaintiff's objection to in camera proceedings
in this case.

Respectfully submitted,

Edward P. Morgan
/s/ Edward P. Morgan

300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006

Gerald S. Rourke
/s/ Gerald S. Rourke

Attorneys for Plaintiff

June 18⁹, 1969

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ORDER

Plaintiff's Motion to Modify Order having come on
for hearing before this Court on June 27, 1969, and the
Court having considered the said Motion, Plaintiff's
Memorandum of Points and Authorities in Support of the
Motion, the Response of the United States, and the oral
argument presented by counsel for plaintiff and the
United States,

IT IS ORDERED that the plaintiff's Motion to Modify
Order be and the same is hereby denied.

Dated this 30th day of June, 1969.

John P. Lirica
UNITED STATES DISTRICT JUDGE

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JUL 25 1969

OPINION

The subject matter of this litigation is the electronic surveillance by the United States of a suite of rooms in the Sheraton Carlton Hotel in Washington, D. C. Plaintiff is suing the United States, Sheraton Corporation of America, and the Washington Sheraton Corporation for trespass and invasion of privacy which allegedly resulted from the eavesdropping on conversations in the suite.

Plaintiff served a notice of deposition ^{1/} and commenced taking the deposition of certain agents of the United States. During the course of his deposition, Edward Pennypacker, an agent of the Federal Bureau of Investigation, refused to answer certain questions on the ground that they would tend to disclose the identity of a confidential informer or informers of the United States. The questions posed by the plaintiff were whether the FBI contacted anyone at the Sheraton Carlton Hotel in connection with its alleged unlawful surveillance of plaintiff's suite therein and, if so, who that person was.

Plaintiff has moved this Court to compel an answer to the above questions pursuant to Rule 37(a) of the Federal Rules of Civil Procedure.

Plaintiff has also moved the Court under Rule 34 of the Federal Rules of Civil Procedure to order the United States to produce for inspection and copying by the plaintiff certain documents alleged to be relevant to plaintiff's cause of action.

Defendant United States has moved for a protective order pursuant to the provisions of Rule 30(b) limiting the scope of the

1/ Fed. R. Civ. P. 26(a).

deposition of Edward Pennypacker and any other agent of the Federal Bureau of Investigation during the course of this action. Defendant United States also moves under Rules 34 and 30(b) for an order limiting the scope of the areas concerning which records must be produced in this action.

This Court has held an extensive hearing on these matters and has considered memoranda in support of and in opposition to each of the motions. The Court also conducted an in camera inspection of certain documents presented to it by the United States concerning the role of the informer or informers in the surveillance. See Westinghouse Elec. Corp. v. City of Burlington, 122 U.S. App. D.C. 65, 73; 351 F.2d 762, 770 (1965).

I will discuss seriatim each of the motions before the Court.

I. MOTION TO COMPEL AN ANSWER TO QUESTIONS

The threshold question in deciding whether or not the government should be compelled to disclose the identity of an informer, concerns the definition of an informer. Roviaro v. United States, 353 U.S. 53 (1957), the leading case in the informer privilege area presented the following definition of the privilege: "... [T]he Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." 353 U.S. at 59.

The actual scope of factual situations in which the privilege has been invoked, however, is significantly broader. It has been held to apply not only to persons who supply information to the authorities but also to those who cooperate with or assist

a law enforcement agency. In Roviaro, for instance, the informer was the transferee of the narcotics. He was the sole participant in the transaction other than the accused. Yet there was no question about his status as an informer.

In Howard v. Allgood, 272 F. Supp. 381 (E.D. La. 1967), the informer knew nothing of the crimes that had been committed and had no knowledge of the reason for the investigation. His sole role in the affair was to let the police know whether or not the petitioner was at home before they attempted to confront him. The Court held that while the informer was not an "informer" insofar as the crime or any element thereof was concerned, it was not error for the government to refuse to disclose his identity. The district judge thus recognized the principle that citizens who assist the police on a confidential basis should remain anonymous.

In Wilson v. United States, 59 F.2d 390 (3d Cir. 1932), a citizen furnished a Prohibition Act officer with a key to premises which contained illegal liquor. Although holding that disclosure was proper since the identity of the informer was necessary to determine the defendant's guilt or innocence, the court naturally classified the person who helped the officer as an informer. The informer's privilege concept, therefore, must be viewed from a broader perspective to include more than mere "information-givers." Courts have consistently, though often tacitly done this in the past. See Gilmore v. United States, 256 F.2d 565 (5th Cir. 1958); United States v. Conforti, 200 F.2d 365 (7th Cir. 1953).

Rather than to limit the class to whom the privilege is generally applicable, the better approach is to weigh the nature of the informer's role in determining whether disclosure is appropriate under the standards established by the Roviaro decision.

The public interest extends beyond merely encouraging members of the public to convey information to the authorities and includes rendering whatever assistance is necessary to achieve effective law enforcement. This duty goes back to more primitive days in our history when citizens were required to participate in the establishment of a posse comitatus. See In re Quarles, 158 U.S. 532, 535-536 (1894).

Applying the above to the facts of this case, it is my view that the person or persons who assisted the government in the eavesdropping of plaintiff's suite were informers within the accepted legal meaning of that word.

Having established that they were informers, it is incumbent upon the Court to determine whether their identity should remain undisclosed.

There can be no disputing the fact that the aid and assistance of citizens and corporations are necessary for the effective administration of justice.^{2/} It is the primary purpose of the informer's privilege to facilitate this private cooperation in law enforcement by encouraging informers to provide pertinent information to the government without fear of public disclosure, retaliation or social disfavor.

^{2/} In an affidavit filed herein, Attorney General John N. Mitchell commented that "confidential informants are the single most important source of information in the field of law enforcement. . . . In my judgment the damage to the public interest which would result from a disclosure of the identity of confidential informants far outweighs the plaintiff's individual interest in this action" Affidavit of John N. Mitchell, Black v. Sheraton Corporation, C.A. No. 440-67 (D.D.C., filed Feb. 20, 1969) p. 2.

Cartha D. DeLoach, Assistant to the Director of the Federal Bureau of Investigation stated that confidential informants to the FBI were responsible for locating 5,864 subjects in 1967 and during the 1965-1967 period indirectly resulted in the recovery of \$33,000,000 in stolen property. The locating of a subject led to his arrest in 22 out of every 25 percentage of the cases. Affidavit of Cartha D. DeLoach, Black v. Sheraton Corporation, C.A. No. 440-67 (D.D.C., filed Feb. 20, 1969) p. 3, 4.

Originally, the informer's privilege was a broadly conceived evidentiary rule insulating persons who assisted the authorities from disclosure. See In re Quarles, 158 U.S. 532 (1894); Vogel v. Gruaz, 110 U.S. 311 (1884). It assumed a quasi-absolute breadth until 1957 when the Supreme Court ruled in Roviaro v. United States, 353 U.S. 53

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense.

Id. at 62.

In a subsequent case the United States Court of Appeals for the District of Columbia construed Roviaro as introducing a fairness concept, making more flexible what was once a mechanical rule. Westinghouse Elec. Corp. v. City of Burlington, 122 U.S. App. D.C. 65, 351 F.2d 762 (1965), on remand, 246 F. Supp. 839 (D.D.C. 1965). Westinghouse also held the Roviaro restructuring of the informer's privilege to be applicable in civil cases. Id. at 72-73, 351 F.2d at 769-770.

This formulation of the informer's privilege, however, has not been applied without difficulty.

The testimonial privileges and incompetencies of the common law have seen a continuing shrinkage. Not that the courts are callous to the protection of informers. . . . However, the informer's shadow over litigation often forces courts to make hard judgments in reconciling basic and conflicting social values. Mannefrid v. Teegarden, 23 F.R.D. 173, 177 (S.D.N.Y. 1959).

A majority of the cases considering the disclosure problem since Roviaro have involved criminal defendants. See, e.g., McCray v. Illinois, 386 U.S. 300 (1967); Rugendorf v. United States, 376 U.S. 528

(1964); Toohey v. United States, 404 F.2d 907 (9th Cir. 1968); Hurst v. United States, 344 F.2d 327 (9th Cir. 1965). The informer's often crucial role in the facts at issue in criminal cases and the serious question of defendant's guilt or innocence operate strongly to prompt disclosure of the informer. But even in this area, where defendant's argument for disclosure is strongest, the courts have been reluctant to create broad disclosure rules. In McCray v. Illinois, 386 U.S. 300 (1967), defendant sought to create a constitutional right to discovery of the informer's identity. His argument that the due process clause of the Fourteenth Amendment and the Sixth Amendment applicable to the states through the Fourteenth Amendment demanded disclosure in state criminal trials was dismissed by a majority of the Justices. The Court was of the view that even in cases where the informer's testimony relates to the ultimate question of the defendant's guilt, there is no absolute rule of disclosure, 386 U.S. at 311.^{3/} Rather, the Court must balance the public interest in protecting the flow of confidential information to the government against the individual's right to prepare his defense, 386 U.S. at 310, citing 353 U.S. at 62. The Supreme Court's reluctance in the most critical of situations has been accompanied by an even greater hesitation to order widespread disclosure "where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake." 386 U.S. at 311. The recently published tentative draft of the American Bar Association Project on Minimum Standards for Criminal Justice relating to Discovery and Procedure Before Trial recognizes the role of informers in effective law enforcement with the result that "only the most compelling cir-

^{3/} In Roviaro the informer was central to circumstances surrounding the illegal act in that he might well have established the defense of entrapment. "He might have thrown doubt upon . . . [defendant's] identity or on the identity of the package." 353 U.S. at 64.

cumstances should require pretrial disclosure of the informer's identity by the prosecution, such as constitutional requirements or the fact that the identity is going to be disclosed anyway when he becomes a witness at a trial or hearing"^{4/}

In the criminal area, the Roviaro doctrine, while broadening the discovery of informers, has been applied with great caution.

The Supreme Court's decision in Roviaro, although directed toward procedures in a criminal prosecution, has been cited as authority in civil cases. In Westinghouse Elec. Corp. v. City of Burlington, 122 U.S. App. D.C. 65, 351 F.2d 762 (1965), the United States Court of Appeals for the District of Columbia unequivocally affirmed its applicability in civil cases. The Court held that "there is no logical reason to set up two different privileges, one for civil and one for criminal cases." Id. at 72, 351 F.2d at 769. "The Roviaro balance should be struck in each case, civil and criminal, in deciding whether disclosure is essential to a fair determination of a cause." Id., quoting 353 U.S. at 61. See, Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958); Mannefrid v. Teegarden, 23 F.R.D. 173 (S.D.N.Y. 1959).

Although Roviaro has been said to be generally applicable to civil suits, disclosure has been ordered in two types of cases: (1) in punitive civil suits; (2) in cases where the informer or the government has waived the privilege. Punitive civil actions are suits brought by private citizens or by the government under authority of a statute to punish noncompliance or to compensate those who suffered injury because of defendant's failure to abide by the statute's terms. Two of the more common civil punitive actions are those brought under the anti-trust laws, 15 U.S.C. § 15 (1964), or the Fair Labor Standards

^{4/} American Bar Association Minimum Standards for Criminal Justice relating to Discovery and Procedure Before Trial (1969), § 2.6, P. 92. See also Preliminary Draft of Proposed Rules of Evidence for the United States District Courts & Magistrates, Rule 5-10, 46 F.R.D. 161, 276 (1969).

Act, 29 U.S.C. § 216 (1964). The statutes authorizing these punitive actions make the private plaintiffs, prosecutors or private attorneys general. The judgment is punitive as well as compensatory and is designed to create a deterrent effect as well as compensate the injured party.

The decision of the United States District Court for the Northern District of Illinois in United States v. Swift & Co., 24 F.R.D. 280 (1959), illustrates the post-Roviaro approach in punitive civil suits. Swift & Co. sought to modify a consent judgment entered against them in a prior anti-trust proceeding. In furtherance of this motion they moved for discovery of certain questionnaires concerning market conditions in the possession of the respondent United States. Rejecting respondent's claim of informer's privilege, the Court held that Roviaro not only abolished any claim of absolute privilege, quoting 353 U.S. at p. 62, but also established a balancing of interests to determine whether disclosure should be ordered, quoting Id. The Court finding that the requested information did not involve an unlawful act and was not the kind to excite resentment, ordered disclosure.

In Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960), Boeing requested certain documents in possession of the United States Renegotiation Board for use in a Tax Court proceeding to determine whether Boeing had made excess profits on a government contract. 50 U.S.C. App. § 1218 (1964). The Court of Appeals rejected the Renegotiation Board's defense on the ground of informer's privilege, and held that Boeing should have access to the Board's factual and investigatory reports. The Court found inter alia that disclosure would not seriously impair the Renegotiation Board's sources of information, and to the extent it did it was in-

significant compared to the importance of this information to the Tax Court" 108 U.S. App. D.C. at 113, 280 F.2d at 661. . . . See Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1962).

A case which illustrates both the "punitive action" and "waiver" exceptions to informer's privilege is City of Burlington v. Westinghouse Elec. Corp., 122 U.S. App. D.C. 65, 351 F.2d 762 (1965). In Westinghouse more than 1800 treble damage actions had been brought in the federal courts against several manufacturers of electrical equipment, of which Westinghouse was one. In defense of these suits, Westinghouse sought to prove by discovery that the plaintiffs knew of the illegal acts more than four years before they brought suit. The reason for this requested discovery was that such knowledge, if there was any, might help establish a defense to the claims of plaintiff-appellees that they should recover damages for transactions beyond the four-year period of limitations because the defendants had fraudulently concealed the alleged conspiracy and thereby tolled the running of the statute of limitations. 15 U.S.C. § 15b.^{5/}

In an attempt to establish this defense the defendants requested every letter, memorandum, or other written communication, and all notes, memoranda or other records of each oral communication, during the period between January 1, 1948, and December 31, 1960, which were made or which are under the control of the Department of Justice, in which any distributor of electricity, group of distributors or engineering consultant or firm thereof, or any officer, agent, or employee of the same, complained, alleged, suggested, or

^{5/} For a more comprehensive review of the electrical equipment cases, see Report of the Co-Ordinating Committee for Multiple Litigation of the United States District Courts, a subcommittee of the Committee on Pretrial Procedure and Practice of the Judicial Conference of the United States (Sept. 1, 1965); Neal and Goldberg, The Electrical Equipment Anti-trust Cases: Novel Judicial Administration, 50 A.B.A.J. 621 (1964).

otherwise asserted that there may have been price fixing or other violations of the anti-trust laws in the electrical equipment industry. The Attorney General moved to quash the subpoena duces tecum on several grounds, one of which was that the documents were protected from disclosure by the informer's privilege. The District Court granted the government's motion to quash the subpoena on the informer's privilege and oppressiveness grounds. Defendants appealed and the Court of Appeals reversed the District Court's order and remanded the case to the District Court for further proceedings consistent with the appellate court's application of the Roviaro doctrine to civil cases.^{6/} On remand the District Court allowed a limited discovery. The District Court held that "the Department of Justice must turn over to the defendants copies of, or allow the defendants to inspect, examine, and make copies of all letters, memoranda and other written communications . . . which are covered by the subpoena and which relate to complaints by persons, corporations, etc. which are, or were at any time, plaintiffs in the electrical equipment cases." 246 F. Supp. at 846. The District Court construed the Court of Appeals' decision to provide that once a complainant has filed suit, he has revealed his identity, and subjected himself to civil discovery, and that the government should not be permitted to withhold information which the plaintiffs themselves would have had to disclose. Id.

The waiver theory has other manifestations than the initiation of a suit. In Clark v. Pearson, 238 F. Supp. 495 (D.D.C.

^{6/} The Court of Appeals sought to include the Westinghouse facts within both recognized exceptions to the informer's privilege. The Court found that "a treble-damage action is not wholly a private civil action. The statute permitting such actions is designed to make private parties prosecutors. The judgment is punitive as well as compensatory." 122 U.S. App. D.C. at 73, 351 F.2d at 770. The Court also held that "plaintiffs in this case should be regarded as having waived the informer's privilege as to their communications with the Government" Id.

1965), plaintiff sued defendant for libel for an article defendant wrote charging plaintiff with graft. In the article defendant stated that he had turned certain incriminating documents over to the Department of Justice. When plaintiff sought to recover the documents the Justice Department resisted on the ground of informer's privilege. The Court ordered that the documents be turned over on the theory that by turning the documents over and then writing in his column about them he waived any right to the privilege.

In Mannefrid v. Teegarden, 23 F.R.D. 173 (S.D.N.Y. 1959), the plaintiffs admitted writing certain letters after noting an objection that the question of the letters were within the scope of the informer's privilege. The Court held that the letters must be turned over since by admitting authorship the plaintiffs had waived the protection of the privilege.

The waiver cases are reconcilable with the teachings of Roviaro. The latter decision created a balancing of interests test in attempting to achieve fairness in administering the privilege. Once a party admits he was an informer he no longer has any interest in anonymity. Likewise when he files suit his interest in remaining anonymous as to matters relevant to the suit disappears. It would be a breach of fairness to allow him to sue another and at the same time erect a legalistic facade of anonymity.

In criminal cases, it is necessarily the defendant, his freedom and reputation in jeopardy, who seeks discovery of an informer who may well have evidence beneficial to the defense. In the punitive civil cases the party who seeks disclosure is similarly in a defensive position defending charges brought by either the government or an individual representing the public interest.

The waiver cases represent a related but converse situation.

In those cases it is not so much that the party who seeks disclosure has equities in his favor justifying the identification of the informer but rather that the informer for some reason has moved without the protection of the privilege.

The matter before the Court in these motions falls within none of the aforementioned categories. It is a civil case, but the party who seeks disclosure is the plaintiff and he seeks to obtain a judgment for compensatory and punitive damages against the defendants. There is no allegation that the informers have waived their privilege; the question in its most basic form is: does fairness derived by balancing the respective interests require anonymity or disclosure.

Plaintiff maintained a suite of rooms at the hotel for ten years preceding May 1966. On May 24, 1966, defendant United States disclosed in a memorandum to the United States Supreme Court that agents of the defendant installed a spike mike listening device in the wall of plaintiff's suite and monitored conversations in defendant's room from February 7, 1963, to April 25, 1963.^{7/}

On February 24, 1967, plaintiff commenced the present action against the United States and the two hotel companies based upon the monitoring of his hotel rooms. Plaintiff contends that the hotel corporations participated in and acquiesced in the tortious trespass and invasion of privacy by the United States and are thereby liable to the plaintiff for compensatory and punitive damages. The

^{7/} Plaintiff was indicted in 1963 and convicted on May 5, 1964, after a jury trial of attempting to evade his 1956, 1957 and 1958 income taxes (U.S.D.C. Cr. Nos. 650-63 and 651-63). The conviction was affirmed on appeal, *Black v. United States*, 353 F.2d 885 (D.C. Cir. 1965) and the Supreme Court denied a petition for certiorari, 384 U.S. 927 (1966). Following disclosures by the Solicitor General, the Supreme Court remanded the case for a new trial, *Black v. United States*, 385 U.S. 26 (1966). Plaintiff was found not guilty on retrial July 17, 1968.

plaintiff seeks to determine the identity of any informers who aided the United States in the alleged illegal eavesdropping. He contends that the identity of the informer or informers, their relationship to the hotel, and the role they played are integral to the cause of action against the hotel corporations.

Plaintiff's justification for obtaining the disclosure of the informer's identity is that plaintiff's constitutional rights have been violated by the defendant and disclosure is a prerequisite to the vindication of those rights. Plaintiff contends that "the fact that plaintiff's privacy was invaded pursuant to a policy of the government to violate the Constitution requires that the informer's privilege be denied the government here."^{8/} Plaintiff thus presents a two fold argument in favor of disclosure: (1) It is necessary for the presentation of his case; (2) The government is not entitled to invoke the privilege. It is helpful in an analysis of this problem to focus on these two reasons in greater detail.

The plaintiff claims that if he is denied the identity of the informer, he would be prejudiced in his attempt to vindicate his constitutional rights. Plaintiff is suing both the United States and the two corporate defendants for damages arising out of the eavesdropping. He is suing the United States for compensatory damages under the Federal Tort Claims Act, 28 U.S.C. § 2671, et. seq.^{9/} The existence or nonexistence of an informer is not important with respect to this cause of action. The government has admitted the fact of the surveillance. Plaintiff has no interest in and

^{8/} Plaintiff's reply to opposition of the United States to motion to compel answers, Black v. Sheraton Corp., C.A. No. 440-67 (D.D.C. 1967) p. 25

^{9/} The suit against the United States is limited to compensatory damages since punitive damages are not recoverable against the United States, 28 U.S.C. § 2674.

consequently in fairness, could not demand that the government disclose the name of its informers.^{10/} Plaintiff's basic affirmative interest then, in obtaining disclosure is in furtherance of his suit against the two private corporations which allegedly participated in this alleged tortious and illegal act. Plaintiff's suit against the hotels may well be facilitated by disclosure of the informer's identity. The extent of his interest in the informer's identity, however, is not so readily apparent since to determine that the Court must examine plaintiff's purpose in suing the hotel corporations. As noted earlier plaintiff has stated an apparent cause of action irrespective of disclosure against the United States under the Federal Tort Claims Act. He may be compensated for any provable damages arising from the eavesdropping. He therefore has no interest in a compensatory action against the hotel since any recovery against the latter would be duplicative to the recovery against the United States. His prime interest therefore in perfecting an action against the hotel corporations is to secure a punitive judgment against them for their alleged roles in the surveillance. This is the sole affirmative interest which the plaintiff seeks to foster by disclosure of the informer's identity.

"[Punitive damages] . . . are allowed and awarded as a punishment to the defendant and as a warning and example to deter him and others from committing like offenses in the future. Under this theory such damages are allowed on grounds of public policy and

^{10/} In its reply to the government's opposition to plaintiff's motion to compel answers, plaintiff, whenever he refers to the necessity for disclosure, always phrases the need in terms of his case against the corporate defendants. See, e.g., plaintiff's reply, Black v. Sheraton Corp., C.A. No. 440-67 (filed Mar. 24, 1969, D.D.C.), pp. 2, 3, 19, 23.

in the interest of society and for the public benefit, not as compensatory damages, but rather in addition to such damages." 22

Am. Jur.2d § 237 (1965) (footnotes omitted); see Washington Gaslight Co. v. Lansden, 172 U.S. 534 (1899); Scott v. Donald, 165 U.S. 58 (1897). Punitive damages are allowable where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression. Id.

Plaintiff's interest in discovering the identity of the informers is to strengthen his case for punitive damages against the defendant hotel. The substantiality of this interest is questionable, especially in light of the ends customarily sought to be achieved by exemplary damages. Plaintiff has alleged an apparent cause of action against the United States for its alleged tortious conduct. Recovery and the consequent publicity may well have a deterrent effect against such tortious conduct if proven. Plaintiff, however, also seeks to discourage private individuals from joining with the government in tortious conduct. Plaintiff must recognize, however, that he is thus placing the burden on a potential informer to determine whether his assistance is tortious. If his role is determined at some future time to be tortious this potential informer must recognize that he would be liable for compensatory and punitive damages. Thus, in reality, the plaintiff desires the identity of the informer so that he may obtain a punitive judgment against the hotel and generally discourage assistance to the government by informers. Plaintiff believes that he would discourage only tortious assistance but in effect the necessity for the informer to prejudge his assistance would generally discourage cooperation.

Plaintiff has, then, what is best termed a minimal
11/
 interest in discovering the identity of the informer.

11/ Plaintiff has contended that he was the subject of an alleged tortious act perpetrated by the informer and his employees, and is

Plaintiff approached the Roviaro balancing alternatively.

We have discussed his interest in discovery, and found it to be minimal. He also proposes that the government has no interest in protecting the identity of the informer.

The informer's privilege does not run to the benefit of the individual but rather is the government's privilege to protect the sources of its information and the individuals who assist it. It stems from a recognition that citizens will not come forward to assist the government if they believe their involvement might well become public, with the consequent danger of reprisals and resentment. Plaintiff's argument that there is no danger of

11/ continued

therefore entitled to compensation for the resulting injuries. In the analogous area of governmental immunity, a cause of action is not granted to every plaintiff alleging that he was the victim of a tort perpetrated by an employee of the United States. A strong governmental interest may override plaintiff's interest in compensation. In Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), Judge Learned Hand commented on governmental privilege, as follows:

Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id. at 581.

Likewise in Blitz v. Boog the Court held that a state psychiatrist was immune from suit for false imprisonment arising from a report that the plaintiff was insane. Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964); See Taylor v. Glotfelty, 201 F.2d 51 (6th Cir. 1952).

In this case where the strong governmental interest with respect to informers is directly involved, the words of Judge Hand have persuasive significance.

retaliation in an individual case does not obviate the necessity for the privilege since it is the disclosure itself rather than the conditions which prompted it that inhibit citizen cooperation. In Westinghouse the Court of Appeals stated, "the privilege exists for the benefit of the general public, not for the benefit of the particular informer involved." Therefore, to the extent that a potential informer believes that his anonymity depends upon someone else's finding that disclosure would be dangerous to the informer he will necessarily be reluctant to give assistance.

The focus in Roviaro is on the plaintiff's variable need vis-a-vis the government's more or less constant need to preserve the anonymity and maintain the cooperation of its informers.

This is not a criminal case nor is it a punitive civil action against the petitioner in this motion. Federal courts have consistently indicated that the privilege is stronger in civil cases. See Bocchicchio v. Curtis Publishing Co., 202 F. Supp. 403, 407 (E.D. Pa. 1962); In re Gurnsey's Petition, 223 F. Supp. 359 (D.D.C. 1963). It is especially so in this case since the plaintiff has an alleged cause of action which does not depend on the informer's disclosure.

II. MOTION FOR DISCOVERY OF DOCUMENTS

Plaintiff's second motion before the Court is for discovery and production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure. The United States has voluntarily consented to turn over a portion of the requested documents dealing ^{12/} 12/ The United States has voluntarily consented to turn over upon court order the following documents (1) the logs of the microphone surveillance (2) any portion of an airtel containing information from the surveillance (3) portions of reports containing information from the surveillance.

with the fruits of the surveillance. An order requiring this limited discovery was filed on May 14, 1969.

The contested portion of the motion involves requests for information about the planning, execution and termination of the 13/ surveillance.

13/ Plaintiff's motion for discovery requests in part:

2. All communications, reports, memoranda, notes, records, record entries, writings and documents of any sort:

(a) containing or relating to any and all requests for permission for, or approval of, the installation of the microphone involved in this surveillance.

(b) containing or relating to any and all authorizations or grants of approval for the installation of said microphone..

(c) concerning or relating to preparations for the installation of said microphone and the conducting of said surveillance, including but not limited to any arrangements with hotel personnel, renting of the rooms involved, obtaining the floor plan of plaintiff's rooms, and obtaining the necessary equipment and instruments.

(d) concerning or relating to the installation of said microphone and the conducting of said surveillance.

(e) concerning or relating to the transfer of the listening station from rooms 436-434 to room 432, and any and all preparations therefor.

(f) concerning or relating to the termination of the surveillance of plaintiff's suite.

(g) concerning or relating to the wiring between rooms 436-434 and room 432 and the apparatus connected therewith, including but not limited to all references to the leaving in place or removal thereof.

(h) concerning or relating to the microphone installed in the wall of plaintiff's suite and the apparatus connected therewith, including but not limited to references to the leaving in place or the removal thereof.

(i) authorizing, relating to, or reflecting the payment of funds for the rental of rooms 436-434 and/or room 432 at the Sheraton-Carlton Hotel in connection with the microphone surveillance of plaintiff's suite.

(j) authorizing, relating to, or reflecting the payment of any funds to or on behalf of or for the benefit or or in connection with the use of any confidential contact at the Sheraton-Carlton Hotel in connection with the microphone surveillance of plaintiff's suite.

(continued)

Rule 34 in essence provides that upon motion of a party showing good cause, another party may be ordered to produce for inspection and copying any nonprivileged documents or tangible objects in his possession which constitute or contain evidence relating to any of the matters within the scope of discovery established by Rule 26(b). The basic prerequisite to discovery^{14/} which the moving party, the plaintiff in this case, must satisfy is that there be good cause for the production of the items he seeks. "Good cause" is ordinarily satisfied by a factual allegation showing that the requested documents are necessary to the establishment of the movant's claim or that denial of production would cause the moving party "hardship or injustice." 4 J. Moore, Federal Practice, par. 34.08 at 2478 (2ed. 1968). See Hickman v. Taylor, 329 U.S. 495 (1947); Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960); Groover, Christie & Merritt v. LoBianco, 119 U.S. App. D.C. 50, 336 F.2d 969 (1964). The movant also has the obligation to establish the materiality^{15/} and relevance of the documents which production he seeks.

Good cause, however, implies a greater showing of need than relevance

13/ continued

(k) requesting, authorizing or instructing the Washington Field Office of the FBI to undertake an investigation into the activities of the plaintiff, or on the basis of which such investigation was undertaken.

(l) concerning or relating to any confidential inside contact at the Sheraton-Carlton Hotel utilized in any way in connection with the microphone surveillance of plaintiff's suite.

14/ That the burden of satisfying the prerequisites to discovery is on the moving party has been well established in this Circuit. See Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960); Von Der Heydt v. Rogers, 102 U.S. App. D.C. 114, 251 F.2d 17 (1958).

15/ Hartford Nat'l Bank & Trust Co. v. E. F. Drew & Co., 13 F.R.D. 127 (D. Del. 1952); William A. Meier Glass Co. v. Anchor Hocking Glass Corp., 11 F.R.D. 487 (W.D. Pa. 1951); Marzo v. Moore-McCormack Lines, 7 F.R.D. 378 (E.D.N.Y. 1945).

and materiality. If this were not so the "good cause" requirement which appears in only Rules 34 and 35 would be meaningless.

Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964). It is the opinion of this Court that vis-a-vis the United States, the plaintiff has not established sufficient good cause to order disclosure.

This is a relatively unique case. The plaintiff has alleged that agents of the United States in the course of their employment did wrongfully trespass upon the plaintiff's suite at the Sheraton Carlton Hotel and did wrongfully invade the privacy and constitutional rights of the plaintiff by eavesdropping on conversations in his suite and thereby violated the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671 et seq.

In answer thereto the United States

admits that the electronic surveillance which is the subject of this action was disclosed in the Supreme Court in June 1966, and that the plaintiff was not at any time prior thereto informed by this defendant that the electronic surveillance had occurred.

Answer of United States, Black v. Sheraton Corporation, C.A. No. 440-67, (D.D.C. Sept. 23, 1968) p. 2 (hereinafter cited as "Answer").

The defendant also admitted in its answer that the eavesdropping was authorized and that the employees of the United States conducting the investigation acted within the scope of their employment. Answer, p. 3.

^{16/} In subsequent deposition hearings the United States admitted that under a Department of Justice practice in effect during the period of 1963 to 1965, the Director of the Federal Bureau of Investigation was given authority to approve the installation of devices such as the spike mike in question, for intelligence purposes when required in the interest of internal security or national safety. The defendant has admitted that acting on the basis of Departmental authorization, the Director approved the installation in the instant case. The defendant further admits that employees within the scope of their employment conducted the surveillance of plaintiff's suite by placing a listening device in a common wall between plaintiff's suite and an adjoining room which penetrated one quarter of an inch into plaintiff's side of the common wall. Answer, p. 3.

States described in detail how the eavesdropping was accomplished. ^{17/}

In light of this admission of the pertinent facts at issue the plaintiff has not alleged sufficient need to justify his discovery relative to his suit against the United States. He has not made a sufficient showing as to why he needs the additional information in light of the facts disclosed by defendant United States.

The United States has submitted to the Court copies of papers on file with the United States District Court for the Southern District of Florida (Miami Division) in the case of Roberta Feiner v. United States, No. 67-611-Civ-CA (S.D. Fla., filed June 12, 1969). The facts of that case as alleged in the papers of the parties are similar to the present case. The United States eavesdropped on conversations in plaintiff's home; voluntarily disclosed the eavesdropping, and was sued by the plaintiff for trespass. Plaintiff sought to discover by deposition information concerning details of the installation and maintenance of the bug. The questions plaintiff asked in Feiner were markedly similar in subject matter to the documents plaintiff seeks to discover in this action, and the United States had made admissions similar to those in this

^{17/} Special Agent Philip M. King of the Federal Bureau of Investigation was deposed by the plaintiff on January 3, 1969. He was one of the agents assigned to the Black surveillance. Agent King testified at length about the planning which led to the installation of the eavesdropping device, its installation into the common wall, and the details of its operation. See deposition of Philip M. King, Black v. Sheraton Corp., C.A. No. 440-67, (D.D.C., filed Jan. 3, 1969), pp. 6-13 (planning; 15-20 (installation); 20-31 (operation).

Special Agent Edward Pennypacker of the Federal Bureau of Investigation was likewise deposed by the plaintiff and gave information concerning the authorization, planning, maintenance and termination of the eavesdropping. See deposition of Edward Pennypacker, Black v. Sheraton Corp., C.A. No. 440-67, (D.D.C., filed Jan. 3, 1969), pp. 26-27, 30, 35, 36 (authorization for surveillance); 27, 30 (planning); 38, 43, 44, 48, 49, 60 (monitoring procedures); 50 (termination).

case. Judge Clyde Atkins denied plaintiff's motion for discovery. The United States had presented two grounds in opposition to the motion. The first and primary one was that in light of the defendant's admissions, the questions were irrelevant. The other ground was national security privilege. While the actual order is unclear as to which ground the Court relied on, the government alleged in a covering letter, filed herein, that irrelevancy was Judge Atkins' ground for his decision.

While Feiner is factually distinguishable from the present case, it is authority for the proposition that the government's rather detailed admission of the facts of the eavesdropping can render further factual discovery irrelevant and without good cause.

Plaintiff contends, however, that this discovery, with special emphasis on sections 2(j) & (l) of the motion,^{18/} is crucial to his cause of action against the corporate defendants. In his affidavit filed herein March 24, 1969, in support of his motion, plaintiff's attorney says, "In particular it is believed that there are or may be documents relating to the existence, identity, and/or activities of an employee or employees or other person or persons connected with the Sheraton Carlton Hotel or the Sheraton defendants who were involved in the eavesdropping on plaintiff's suite." Affidavit of Gerald S. Rourke, Black v. Sheraton Corp., C.A. No. 440-67, (D.D.C., filed Mar. 24, 1969) pp. 1, 2.

Rule 34 of the Federal Rules of Civil Procedure limits discovery to those documents which are not privileged. The question, then, as it was in the previous motion, is, whether the documents

^{18/} See note 13, supra.

plaintiff seeks to discover are privileged. For the same reasons this Court gave in response to the motion to compel answers, the identity of the alleged informers is protected by the informer's privilege. Therefore, any documents which would tend to disclose his identity are also privileged.

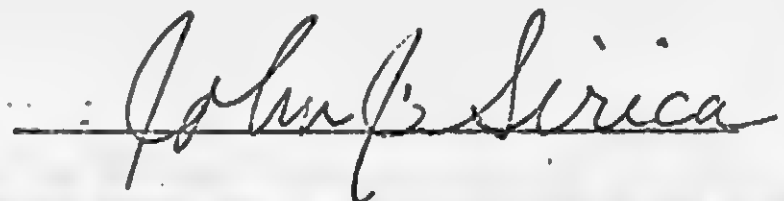
What are the documents for which the plaintiff has need against the corporate defendants? Obviously, they do not need the documents alleging the facts of the alleged tort since the government has admitted the facts. Rather, they seek documents which might somehow connect the informer to the corporate defendants. Since these documents would certainly tend to identify the informer, this Court holds that they are not discoverable. Hence, in neither its suit against the United States nor the corporate defendants has the plaintiff satisfied the prerequisites to discovery of the documents requested by its motion.

III. MOTION FOR A PROTECTIVE ORDER

Defendant has moved this Court to issue a protective order under Rule 30(b) limiting the scope of the plaintiff's deposition of defendant's employees, and plaintiff's request for disclosure of documents in the possession of the defendant United States. This Court is of the view that its orders in the two preceding motions will effectively limit plaintiff's discovery to matters relevant, nonprivileged and necessary, and that a formal protective order at this time would be premature and unnecessary.

Counsel will submit an appropriate order.

July 24, 1969

A handwritten signature in cursive script, reading "John P. Sirica", written over a horizontal line.

(Caption omitted in filing)

FILED

ORDIA

JUL 11 1969

The plaintiff herein having served this Court pursuant to Rule 37(a) of the Federal Rules of Civil Procedure for an order to compel answer by agents of the United States to questions pertaining to the identity of persons allegedly connected with and/or employed by the Sheraton Corporation of America and/or the Washington Sheraton Corporation who are alleged to have assisted in the electronic surveillance which is the basis of this action, the plaintiff having moved this Court pursuant to Rule 34 of the Federal Rules of Civil Procedure for an order requiring the United States to produce from its files certain documents pertinent to the aforesaid electronic surveillance, the United States having moved this Court pursuant to Rules 30(b) and 34 of the Federal Rules of Civil Procedure for a protective order limiting the scope of discovery by plaintiff by deposition and motion for production, the Court having considered the said motions of the parties, all papers filed in support of and in opposition to them, and the oral argument of counsel for the parties in reference to the motions, and the Court having filed an opinion in the matter on July 25, 1969.

IT IS HEREBY ORDERED THAT:

1. The motion of plaintiff to compel answer to questions is and the same is hereby denied;
2. The motion of plaintiff to compel production of documents is and the same is hereby denied; and

3. The motion of the United States for a protective order limiting the scope of discovery be and the same is hereby denied as unnecessary at this time in light of the denial by this Court of the motions of plaintiff.

In making its determination as set forth above, the Court is of the opinion, pursuant to 28 U.S.C. 1292(b), that this Order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

Dated this 11th day of August, 1969.

John P. Sirica
U.S. DISTRICT JUDGE

APPROVED AS TO FORM

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EXCERPTS FROM PETITION FOR IMMEDIATE APPEAL

Questions Presented

The district court's decision presents the following questions of law:

1. Does the informer's privilege apply in this case?
2. Did the district court err in examining the Government's

evidence in camera and refusing to conduct an evidentiary hearing?

FILED

SEP 25 1969

[Caption Omitted in Printing]

United States Court of Appeals

Before: Fahy, Senior Circuit Judge,
BERT M. STEARNS, Clerk. McGowan, Circuit Judge; in
Chambers

FILED SEP 22 1969

Nathan J. Paulson
CLERK

ORDER

On consideration of petitioner's petition for the allowance of an immediate appeal under 28 U.S.C. § 1292 (b) of respondents' opposition and petitioner's reply with respect thereto, it is

ORDERED by the Court that petitioner's aforesaid petition for allowance of interlocutory appeal under 28 U.S.C. § 1292(b) is granted.

Counsel are urged to docket the record on appeal and to file their briefs on appeal as soon as possible and the Clerk is directed to schedule the appeal for argument on the merits as promptly after the briefs are filed as the business of the Court will permit.

Per Curiam

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
For the District of Columbia Circuit.

Judith McDevitt
Deputy Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,542

FRED B. BLACK, JR.,
Appellant,

v.

SHERATON CORPORATION OF AMERICA, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

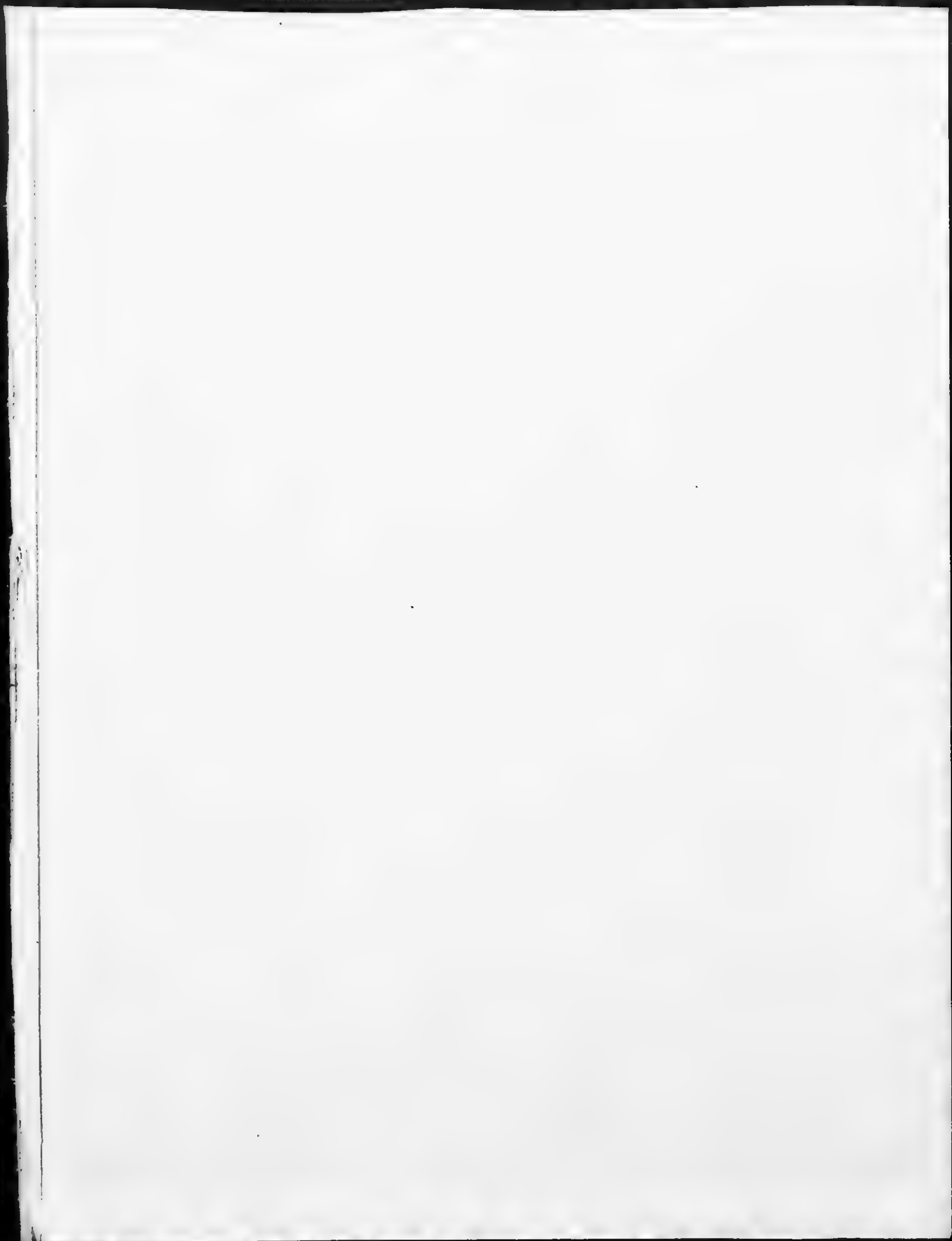
United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 19 1969

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(i)

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8 Wigmore, Evidence (McNaughton rev. 1961), §2192 (3)	22

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,542

FRED B. BLACK, JR.,
Appellant,

v.

SHERATON CORPORATION OF AMERICA, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

ISSUES PRESENTED

I. Were the persons connected with the hotel who were involved in the electronic eavesdropping by the Government informers within the meaning of the informer's privilege?

II. Was the plaintiff denied due process of law by the district court's *in camera* examination of the Government's evidence?

III. Should the informer's privilege apply to the persons connected with the hotel who were involved in the Government's electronic eavesdropping on plaintiff's suite?

IV. Are the roles played by the persons connected with the hotel and the circumstances surrounding their use by the Government privileged?

V. Does the imperative of judicial integrity require that the courts deny the Government a privilege where it has intentionally and deliberately violated the Constitutional rights of a citizen as a matter of policy?

VI. Is the plaintiff entitled to discovery of documents concerning the time when the microphone was removed from the wall of his suite?

This is an interlocutory appeal under 28 U.S.C. §1292(b) by permission of the Court. The case was previously before the Court under the same name on the Petition for Immediate Appeal Under 28 U.S.C. §1292(b), case number MISC. 3470.

REFERENCES TO RULINGS

The opinion of District Judge John J. Sirica is in the Joint Appendix at page 64, the order being appealed from is at page 87, and the order of this court granting an immediate appeal is at page 89.

STATEMENT OF THE CASE

This is a civil suit growing out of the electronic eavesdropping by the United States on plaintiff's suit of rooms in the Sheraton Carlton Hotel in Washington, D. C. in 1963. In May of 1966 it was revealed in the Supreme Court of the United States that during the months of February, March, and April, 1963, the United States Government, through agents of the Federal Bureau of Investigation

had intruded upon the privacy of plaintiff's suite of rooms in the hotel by means of a microphone inserted through the wall between an adjoining room and plaintiff's suite, eavesdropping upon and recording, logging, or transcribing all conversations and activities which took place therein. (A. 10, 22, 23)¹ In this lawsuit plaintiff seeks damages from the United States, the Sheraton Corporation of America and the Washington Sheraton Corporation for trespass, invasion of privacy, and violation of Constitutional rights in connection with that microphone eavesdropping. Plaintiff's suit against the United States is under the Federal Tort Claims Act, 28 USC § 1346(b), 2671 et seq., (A. 16, 17) and his suit against the hotel corporations is for violation of the common law duties of the inkeeper to his guests. (A. 8-16)

In its answer the United States has admitted that the microphone eavesdropping took place but has denied liability and has denied that Plaintiff suffered any damages. (A. 21-23) The Sheraton defendants have either denied the allegations of the complaint or denied knowledge or information sufficient to form a belief as to them. (A. 26-29)

Plaintiff deposed FBI agent Philip M. King who testified that he rented the room used by the agents under an assumed name, but denied having any other contact with persons at the hotel in connection with the eavesdropping. Plaintiff then took the deposition of Edward W. Pennypacker, the FBI case agent in charge of the eavesdropping operation. Mr. Pennypacker refused to answer any questions concerning contacts with the hotel personnel on the ground to do so would tend to disclose the identity of a confidential informer or informers of the United States. (A. 38)

¹The citation "A" refers to the Joint Appendix.

Plaintiff moved in the district court for discovery of documents related to the matters about which Mr. Pennypacker and Mr. King had testified, and for an order to compel Mr. Pennypacker to answer questions concerning his contacts with persons connected with the hotel. (A. 43, 48) The Government moved for a protective order barring any discovery of these matters by the plaintiff, and the three motions were heard together by the district court.

With its opposition to plaintiff's motion to compel answers the Government submitted affidavits of the Attorney General (A. 51-53), the Assistant to the Director of the FBI, (A. 53-57) and Mr. Pennypacker. (A. 57-59) This was the only evidence submitted by the Government on the record. In the court below the plaintiff asked the court to conduct an evidentiary hearing to determine the facts and circumstances surrounding the Government's use of an inside contact at the hotel. (A. 48) His grounds for requesting a hearing were twofold. First, even if the informer's privilege were applicable, which he denied, plaintiff maintained that under *Roviaro v. United States*, 353 U.S. 53 (1957), and *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 122 U.S. App. D.C. 65, 351 F.2d (1965), it would apply only to the *identity* of the alleged informer. The plaintiff contended there were many questions concerning the Government's use of this person which could be answered without in any way tending to disclose his identity, questions which were highly relevant and material to the liability of the Sheraton defendants. The plaintiff urged that these matters, which were not even arguably privileged, be disposed of before the question of the identity of the person involved was reached.

The plaintiff's second ground for requesting an evidentiary hearing was that, assuming eavesdropping constituted informing, which he denied, under *Roviaro* and *Westinghouse* the question whether the informer's privilege applied was to be determined on the basis

of the particular circumstances of the case. The plaintiff urged the court to conduct an evidentiary hearing to determine the role played by the alleged informer in order that the relevance and materiality of his identity and possible testimony to the issues in the case could be ascertained.

At the oral argument on these motions² counsel for the plaintiff listed ten questions to illustrate the type of question which the Government could answer without disclosing the identity of the alleged informer, questions relevant either to the liability of the Sheraton defendants or the determination whether the privilege should apply or both. These questions were:

1. Did the Government have the assistance of anyone at the Sheraton Carlton Hotel in its eavesdropping on the Plaintiff's suite?
2. Did the Government seek him out or did he come to the Government?
3. How many persons at the hotel were involved?
4. With respect to each such person who assisted the Government: Was he an employee of one or the other of the Sheraton defendants?
5. Is he presently living? (Under *Roviaro* if he is no longer living the privilege is inapplicable.)
6. Is he presently employed by one or the other of the Sheraton defendants?
7. What role did he play in the eavesdropping?

² A transcript of the proceedings in the district court is not part of the record because no testimony of any witness was taken, and the two day proceedings consisted almost entirely of argument by counsel which substantially duplicated the arguments advanced in the extensive briefs filed in the district court. If the court wishes to review the oral argument below a transcript will be ordered and filed as part of the record.

8. If he provided information, what information did he provide?
9. If he provided other assistance, what assistance did he provide?
10. Did he furnish information as to any violations of law by the Plaintiff?

Plaintiff pointed out that most of these questions require only a yes or no answer which could hardly tend to identify anyone, and that under *Roviaro*, only the answers to questions 8 and 9 might be privileged, and then only if the activity or information were such that it would point to a particular individual.

In opposition to the plaintiff's request for an evidentiary hearing, the Government asked the court to view *in camera* certain documents from its files, which it asserted would persuade the court to deny Plaintiff any discovery in this matter. Although the Plaintiff requested the Government to state the purpose of the proposed *in camera* inspection, the Government did not do so. However, at the end of the oral argument, the court stated that he would take the whole matter under advisement and that he would view the Government's documents *in camera*, and instructed Government counsel to prepare an order. Thereafter an order (A. 60) providing for submission for *in camera* inspection of all documents in the Government files pertaining to any and all activities of, conversations with, and information obtained from the alleged informer was submitted and signed by the court over the objection of the plaintiff.

Prior to the court's *in camera* inspection of the documents the plaintiff moved to modify the above order to limit the documents to be viewed to those pertaining to the alleged informer's activities in connection with the microphone eavesdropping upon plaintiff's suite, on the ground that any other documents would be irrelevant

to the question before the court and might be prejudicial to the plaintiff. (A. 61) Plaintiff again asked for an evidentiary hearing rather than an *in camera* inspection by the Court, asked the court to state for the record the purpose of the *in camera* proceedings, and pointed out that there did not appear to be any purpose for such proceedings except to receive evidence on the merits of a question at issue before the court, i.e., whether the informer's privilege should be held applicable. Plaintiff also pointed out that the court would not have before it *in camera* all the relevant evidence on the question at issue, since the documents in the Government's files would show only some of the activities of the alleged informer, those written down and placed in the file, while his activities most relevant for purposes of this case might not be relevant to the purposes of the FBI investigation and might not appear in the file at all, but would be known to Pennypacker, who could testify about them.

After hearing oral argument on the motion to modify, the court denied plaintiff's motion in all respects. (A. 63) Then after viewing the Government's evidence *in camera*, the court handed down his opinion (A. 64) denying in all respects plaintiff's motions to compel answers and for discovery and upholding the Government's claim of the informer's privilege, apparently as interpreted by the Government, i.e., everything connected with this person in any way is privileged, not only his identity.

In the district court the Government did not deny that the identity of the persons connected with the hotel was highly relevant and material to plaintiff's case against the Sheraton defendants, not did the Government dispute the plaintiff's assertion that such persons would be in no physical danger if their identities were disclosed in this case.

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THE PERSONS CONNECTED WITH THE HOTEL WHO WERE INVOLVED IN THE ELECTRONIC EAVESDROPPING BY THE GOVERNMENT WERE NOT INFORMERS WITHIN THE MEANING OF THE INFORMER'S PRIVILEGE.

In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the Supreme Court defined the informer's privilege as follows:

"What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. (Citations omitted.) The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The limitation of the privilege to persons "who furnish information of violations of law" is in keeping with the accepted meaning of the word "informer" as it is used in law enforcement and as it is commonly understood. For example, in Webster's New International Dictionary, Second Edition, 1952, 1276, the word "informer" is defined as

"3. One who informs against another; specif., *Law*, one who informs a magistrate of a violation of law."

Under the *Roviaro* definition of an informer, the persons connected with the hotel who were involved in the electronic eavesdropping on plaintiff's suite do not qualify as informers. They were not

the source of any information obtained through the electronic eavesdropping. Persons involved in electronic eavesdropping do not "furnish information" or "communicate their knowledge" of the commission of crimes to law enforcement officers, they merely make it possible for the law enforcement officers to eavesdrop on the private conversations of others.

In the absence of any factual showing, it can only be presumed that what the persons connected with the hotel did was to take part or assist in the installation, operation, or concealment of the electronic listening device which transmitted the words spoken in plaintiff's suite to agents listening in a nearby room. In this situation, any knowledge communicated was communicated by the person speaking in plaintiff's suite whose conversation, unbeknownst to him, was being overheard. Any information furnished was furnished by those being eavesdropped upon. It certainly was not furnished by the persons connected with the hotel who were involved in the eavesdropping. The persons involved and the electronic device, "the uninvited ear", *Katz v. United States*, 389 U.S. 347, 352, (1967), were merely instruments by which the Government was enabled to listen to conversations taking place in the privacy of a hotel room.

In addition, as the statement of the privilege in *Roviaro* indicates, an essential element of informing is a report of a violation of law. Merely furnishing information in general does not constitute informing. There has been no claim or showing by the Government, and no finding by the District Court, that the persons connected with the hotel, by their involvement in the electronic eavesdropping on plaintiff's suite, furnished any information of violations of law to the Government. On the contrary, the Government effectively acknowledged in the Supreme Court that such information was not obtained. In disclosing this eavesdropping in the Supreme Court, the Government stated that "Recital of these facts is not intended

to suggest that any wrongdoing on the part of the petitioner was uncovered by the monitoring". Footnote, p. 4 (Unpublished) Supplemental Memorandum for the United States, dated July, 1966, in *Black v. United States*, Supreme Court of the United States, October term 1966, No. 1029, October term, 1965.

The plaintiff does not mean to suggest that if information of violations of law were obtained through electronic eavesdropping, the persons involved would thereby become informers within the meaning of the informer's privilege, for they certainly would not. But that situation is not before the court, and the fact that such information was *not* obtained here should eliminate any possibility of such persons being considered informers in this case.

There is no precedent for considering persons involved in electronic eavesdropping as informers and there is persuasive legal authority to support a contrary finding. Although the question appears to be a matter of first impression in the courts, the closely analogous question whether persons involved in wiretapping are informers was ruled on by the highest court of the state of New Jersey. In the case of *Morss v. Forbes*, 24 N.J. 341, 132 A.2d 1, (1957) it was held that persons involved in wiretapping are not informers and that the informer's privilege cannot apply to them.

In *Morss v. Forbes*, *supra*, a county prosecutor testifying before a committee of the state legislature was asked if he had engaged in wiretapping, and when he answered in the affirmative, he was asked for the names of the persons who had taken part. The prosecutor refused to divulge the names, claiming among other things that the informer's privilege applied. When a lower court upheld the prosecutor's claim of privilege and the matter was appealed, the Supreme Court of the state certified the case to it, reversed the lower court, and ruled that the requested information was not privileged.

On the question of the informer's privilege the court quoted the definition of the privilege in *Roviaro*, referred to above, and stated:

"The Committee submits, however, that the court below committed error in classifying wiretappers in the same category as informers, and there seems to be merit in this view. Those who tap wires are mere accessories to the disposition, control and regulation of the mechanical contrivances employed to accomplish that object. Their function is to record telephone conversations in a permanent form and to transmit the substance, so memorialized, to their employers. The person operating the tap acquired information of wrongdoing only as an incident to the pursuit of his primary function. If information of criminal conduct is secured in the form of an admission or evidence of participation, it comes from the mouth of the person whose telephone is tapped and not from the functionary who presides over the mechanical working of the recording process. He is not the originator or source of the information imparted to the agency of the law, he merely complies with instructions received from the police authority. Of course, a wiretapper may also be an informer under certain circumstances, but that is not the factual development here encountered. Those persons who supervised and actually tapped wires for the prosecutor do not come within the classification or category of 'informer.' The common-law privilege has no applicability to persons who undertake to tap wires in accordance with their employment." (132 A.2d at 13)

This analysis of wiretapping by the Supreme Court of New Jersey is equally applicable to eavesdropping by microphone. It should be followed here, for the two situations are essentially indistinguishable.

Those involved in eavesdropping by microphone, like those involved in eavesdropping by wiretap, simply "do not come within the classification or category of 'informer.' "

The district court in his opinion does not address himself directly to the question whether persons involved in electronic eavesdropping are informers within the informer's privilege. Instead he finds, purportedly on the basis of a review of prior case law, that the term "informer" has been broadly interpreted to apply not only to those who furnish information of violations of law but also to those who merely "cooperate with or assist a law enforcement agency". (A. 65-66) Since the persons connected with the hotel apparently "cooperated" with or "assisted" the Government in its eavesdropping, although there has been no showing to that effect in the record, in the court's view they are informers and thus eligible for the informer's privilege.

There is simply no support in the prior case law for the district court's theory. In keeping with the general disfavor of the law for evidentiary privileges, See 8 Wigmore, Evidence (McNaughton rev. 1961) §2192(3), the term "informer" in the context of the informer's privilege has uniformly been construed narrowly by the courts. In no reported case has it ever been held that any activity other than furnishing information of violations of law constituted informing within the informer's privilege.

The district court quotes the definition of the informer's privilege in *Roviaro*, and implicitly acknowledges that this case does not come within that definition by the statement that "The actual scope of the factual situations in which the privilege has been invoked, however, is significantly broader." (A. 65) In each of the five cases cited in support of this proposition, however, a review of the fact situation and the court's opinion reveals that only persons who furn-

ished information of violations of law were held to be informers within the privilege. In four of these cases the informer did more than merely furnish information of violations of law, but in those cases the courts clearly specified that it was the providing of such information which made the person an informer, not his other activities. Moreover, in the one case where such information was not furnished but it was nonetheless claimed that the person was an informer within the scope of the privilege, the court held that the person was not an informer and therefore not entitled to the privilege.

Three of the cases cited by the district court in support of its broad reading of the term "informer", *Roviaro, supra, Gilmore v. United States*, 256 F.2d 565 (5 Cir. 1958), and *United States v. Conforti*, 200 F.2d 365 (7 Cir. 1952) involve the use by law enforcement officers of what are variously referred to as "special employees", *Gilmore, supra*, "confidential sources", *Conforti, supra*, and the like, euphemisms for persons paid for furnishing information of violations of law. These are informers in the age old meaning of that term. The cases cited, and many others like them, arise when the law enforcement officers use the "special employees" not only as sources of information of crime but also as decoys to enable the law enforcement officers to witness the actual commission of a crime—such as the sale of narcotics, *Roviaro, Gilmore*, or counterfeit money, *Conforti*, or to capture the seller of illegal goods in the act. In such cases it is either assumed or the Government declares that the "special employee" was an informer, i.e., he provided information as to the violation of law. The question at issue in such cases is whether, in his further role as a decoy, the informer played a sufficiently important part in the actual commission of the crime to make him a necessary witness at the trial—in spite of the fact that he was an informer and as such presumably entitled to the informer's privilege. Thus in *Roviaro*, the Supreme Court stated that in the district court the Government had objected to disclosing the identity of

John Doe "on the ground that John Doe was an informer." 353 US at 55. The Court then set forth a detailed statement of the manner in which the admitted informer, John Doe, was used as a decoy to obtain evidence against the petitioner. The Court stated that the problem raised by the facts in *Roviaro* was:

"the Government's right to withhold the identity of an informer who helped to set up the commission of the crime and who was present at its occurrence."
353 US at 61.

It is a distortion of the obvious meaning of *Roviaro* to infer that John Doe is to be considered an informer *because* he helped to set up the commission of the crime and was present at its occurrence. As the Supreme Court clearly indicated in the passage from *Roviaro* quoted at the beginning of this discussion, John Doe was an informer because he furnished information of violations of law.

The district court states:

"In *Roviaro*, for instance, the informer was the transferee of the narcotics. He was the sole participant in the transaction other than the accused. Yet there was no question about his status as an informer." (A. 66)

This statement simply does not go to the question at issue before the court.

That it is furnishing information of violations of law which makes a person an informer, and that alone, is made clear in *Gilmore, supra*, and *Conforti, supra*, the other decoy cases cited by the district court. In each of these cases the court indicates that by acting as a decoy or engaging in other activities to assist the law enforcement officers, the person in question was going beyond the role of an informer.

In denying the informer's privilege in *Gilmore, supra*, the Fifth Circuit said:

"Here Anonymous had done more than merely inform or supply information. He was an active participant in setting the stage, in creating the atmosphere of confidence beforehand and in continuing it by his close presence during the moments of critical conversation." 256 F.2d at 567.

In denying the informer's privilege in *Conforti, supra*, the Seventh Circuit said:

"the Government insists, and correctly so, that communications made by informers to the Government are privileged. But the unidentified person, No. 54, involved in this case was more than a mere informer. He was not simply an individual who, knowing that the defendant had committed or was about to commit a crime, communicated that knowledge to the authorities so that the police, acting independently, might then procure evidence of the crime. On the contrary, No. 54 played a part with the defendant in the very transactions upon which the Government relies to prove its case." 200 F.2d at 367.

Thus in the very cases cited by the district court for the proposition that activities other than furnishing information of violations of law have been held to constitute informing within the informer's privilege, the courts themselves stated that these other activities were *not* part of informing but served instead to take the person, who was admittedly an informer, *out* of the informer's privilege.

The decoy cases cited by the district court directly contradict the suggestion that there has been a broadening of the meaning of

the term "informer" to the point where anyone who cooperates with or assists a law enforcement agency in any way is considered by the courts to be an informer. These cases illustrate the manner in which the courts have narrowly construed the term "informer," limiting it to the furnishing of information of violations of law, and carefully distinguishing between informing and other ways of cooperating with or assisting law enforcement officers, such as acting as a decoy.

The facts of *Wilson v. United States*, 59 F.2d 390 (3 Cir. 1932) do not support the district court's interpretation of that case, either. In his description of the case, the district court states the fact that "a citizen furnished a Prohibition Act officer with a key to premises which contained illegal liquor," (A. 66) but does not state that the citizen also furnished information of the violation of law, which is what made him an informer within the *Roviaro* definition. A detailed statement of the facts in *Wilson* is set out at the beginning of the dissenting opinion, as follows:

"A member of the Democratic League of Delaware, a social political corporation, told Harold D. Wilson, deputy prohibition administrator for the District of Delaware, that the league was in possession of intoxicating liquor and was maintaining a nuisance on its property located in the city of Wilmington, Del., in violation of the National Prohibition Act. The member gave Wilson a key . . ." 59 F.2d at 392.

Thus *Wilson* does not support the district court's contention that the informer's privilege concept "must be viewed from a broader perspective to include more than mere information-givers," (A. 66) for the informer in *Wilson* was just that—an information giver, and it was information of a violation of law, too. Furthermore, *Wilson* was the forerunner of the decoy cases referred to above in its hold-

ing that the additional activities of the informer took him out of the informer's privilege, which led to the Supreme Court's modification of the privilege itself in *Roviaro*. (See *Roviaro*, 353 US at 56, and the cases there cited as the Court's basis for granting certiorari.)

It should be noted in passing that in each of the above four cases cited by the district court for a broader reading of the term "informer" as used in the informer's privilege, based on additional activities engaged in by the informers in those cases, the privilege was *denied*—because the other activities of the informer made his testimony relevant and material to the issues in the case, and required disclosure of his identity.

The fifth case cited by the district court for a broad interpretation of the term "informer" is *Howard v. Allgood*, 272 F.Supp. 381 (E.D. La. 1967). In that case, as the district court indicates, the person who was claimed to be an informer knew nothing of the crimes that had been committed and had no knowledge of the reason for the investigation, i.e., he did not furnish information of any violation of law. As the court states:

"His sole role in the affair was to let the police know whether or not the petitioner was at home before they attempted to confront him." (A. 66)

At the trial, the state court judge ruled the person was not an informer and ordered the policeman who refused to name him jailed for contempt. On the petition for habeas corpus, the federal court agreed the man was not an informer and that the policeman should have named him, but held that the refusal to do so was not prejudicial because the man knew nothing about the case and his name would have done the defense no good, anyway. 272 F.Supp. at 385. Nothing in *Howard v. Allgood* suggests that anyone other than a

person who furnishes information of violations of law is an informer within the informer's privilege. Indeed, the case properly stands for the proposition that one who assists law enforcement officers in some way other than by furnishing information of violations of law is *not* an informer within the informer's privilege. Nor does anything in *Howard v. Allgood* suggest that the district judge recognized any "principle that citizens who assist the police on a confidential basis should remain anonymous" (A. 66) except, perhaps, where their testimony would not be material to the issues in a case before the court.

The cases cited by the district court simply do not support a broad interpretation of the term "informer" as it is used in the informer's privilege. Furthermore, as previously indicated, the parties have been unable to find a single reported case in which the informer's privilege has ever been extended to anyone other than a person who furnished information of violations of law.

In short, there is no basis in law for the district court's ruling that the persons connected with the hotel who were involved in the electronic eavesdropping on plaintiff's suite were informers within the meaning of the informer's privilege.

Finally, the public interest purpose behind the informer's privilege, encouraging citizens to communicate their knowledge of the commission of crimes to law enforcement officials, will not be carried out by granting the privilege to persons involved in electronic eavesdropping. As previously indicated, such persons do not have knowledge of the commission of crimes and do not communicate such knowledge to law enforcement officials. The only thing that would be encouraged in the future by extending an evidentiary privilege to the persons connected with the hotel is what those persons did, and it is certainly not in the public interest to encourage citi-

zens to cooperated in the unlawful invasion of the privacy of other citizens by law enforcement officers.

For the courts to create an evidentiary privilege for persons who are involved in unlawful electronic eavesdropping would be to invite persons who may well be in a position to prevent such invasions of privacy from occurring, and who might otherwise do so, to instead cooperate with and assist in such activity by law enforcement officers, secure in the knowledge that if the invasion of privacy becomes known, their part in it will not be disclosed, and they or the parties for whom they are acting will not be held liable. The creating of such a privilege is not in the public interest.

The persons connected with the hotel who were involved in the electronic eavesdropping on plaintiff's suite were not informers within the meaning of the informer's privilege as it has existed heretofore, and there is no reason for the court to change the meaning of the word informer, and the privilege, to include such persons now. The decision of the district court, which does that, should be reversed.

II

THE PLAINTIFF WAS DENIED DUE PROCESS OF LAW BY THE DISTRICT COURT'S *IN CAMERA* RECEPTION OF EVIDENCE.

The district court's opinion and facts set forth in the Statement of the Case establish that what the court did in this case was to receive *in camera* the Government's evidence on the merits of the question whether the informer's privilege applies, and then immediately rule against the plaintiff on the basis of that evidence, without conducting any evidentiary hearing or affording the plaintiff an opportunity to know what the evidence was, or to cross-examine the witnesses who gave that evidence, or to rebut that evidence. Such a proceeding directly violates fundamental principles of due process of law.

In his opinion the district court states

“the Court also conducted an *in camera* inspection of certain documents presented to it by the United States concerning the role of the informer or informers in the surveillance.” (A 65)

However, this was no mere “inspection” of documents to determine which were relevant to the question at issue or for some other legitimate purpose. These documents were received in evidence for their substance, for *the court’s decision is based on the evidence contained in those documents*. The district court did exactly what this Court, in dictum, said the Tax Court could *not* do in *Boeing Airplane Company v. Coggeshell*, 108 U.S. App. D. C. 106, 280 F. 2d 654, 660 (1960):

“... the Tax Court could not, in fairness to either party, base a decision on *in camera* consideration of evidence, . . .”

Nowhere in his opinion does the court state *why* he inspected the evidence *in camera*, or what the purpose or justification for the *in camera* proceedings was in the context of the case. In the court below, counsel for the plaintiff repeatedly requested both the Government and the court to state the purpose of the proposed *in camera* proceedings, stating that he could see no purpose for such proceedings other than the reception of evidence by the court out of the presence of the plaintiff. No response was forthcoming in the court below and none is found in the court’s opinion.

If the court had merely conducted an *in camera* inspection of Government documents, and then ordered the Government to proceed with its evidentiary showing, his action might not have violated due process although the extent of the documents viewed here

would have been seriously prejudicial to the plaintiff in any event.³ However, the district court's *in camera* examination of documents in this case simply took the place of an evidentiary hearing. By proceeding in such a manner, the court has deprived the plaintiff of any semblance of due process of law.

Under *Roviaro* a claim of the informer's privilege involves not one but two questions, first, should the privilege be granted, and second, if it is granted, to what does it apply? Plaintiff submits that the first of these is an evidentiary question, to be resolved by a weighing and testing of the particular circumstances of the case, the part played by the informer in the events before the court, the relevance and materiality of the identity and possible testimony of the informer to the issues, the possible danger to the informer if his identity is disclosed, and the like. *Roviaro*, 353 U.S. at 62; *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 122 U.S.

³From the description in the court's order of the documents submitted *in camera* (A. 60-61), it is apparent that much of this material had nothing to do with the eavesdropping on plaintiff's suite, the subject of this lawsuit, i.e. "2. All documents which contain, detail, state or summarize *any information or assistance* which the confidential informant furnished. . . . 3. . . . *any contact, meeting, or communication.* . . ." The court is the trier of fact on plaintiff's claim against the Government and among other things will be called upon to set the damages for intangible injuries suffered by the plaintiff, such as invasion of privacy and injury to reputation. In this situation, for the court to examine *in camera* a considerable volume of material from the FBI files unrelated to this case, material which is almost certainly gravely prejudicial to the plaintiff, cannot be proper. Certainly the Government could never get this material before a jury in any event. As was indicated to the court below, plaintiff would never have consented to the assignment of this case to one judge for all purposes had he had any inkling there would be any occasion for the court to conduct an extensive *in camera* examination of documents from the FBI files during the pre-trial proceedings. The prejudice here is manifest, for it is very unlikely plaintiff is ever going to get to see these additional documents or be given a chance to rebut whatever is in them.

App. D.C. 65, 351 F.2d 762, 768 (1965). The burden of proof is on the Government, the party claiming the privilege. See Restatement of Torts, § 613; Prosser, Torts, 2nd Ed. 1955, § 629. The opposing party should be given an opportunity to participate, to cross-examine the Government witnesses and to present evidence that the privilege should not be granted. The decision is to be made by the court on the basis of a balancing of the factors favoring disclosure of the informer's identity against the factors favoring non-disclosure. *Roviaro*, 353 U.S. at 62; *Westinghouse*, 351 F.2d at 768. It is in the district court's handling of this first question that plaintiff contends he was denied due process of law.

Only if the court, after an evidentiary hearing, rules that the Government is entitled to the informer's privilege is the second question reached, the question of what information or documents are to be privileged. This question is for the court to resolve by whatever means are most appropriate in the circumstances. Where documents are involved, the court may inspect the documents *in camera* to determine which documents, or parts, if any, can be turned over for use in the case without compromising the privileged matter. or to determine whether in a large government file there are any documents relevant to the case which are not privileged, *Westinghouse*, 351 F.2d at 770. Where testimony is involved, the court should determine for each question whether the answer will involve privileged information, and rule whether it should be answered.

In this case the district court erred in taking it upon himself to decide both of these questions *in camera*, as if only the second question were involved. By receiving the Government's evidence *in camera* and denying plaintiff any chance to take part or be heard on the threshold question whether the privilege should be granted, the court denied the plaintiff due process of law.

Once it has been determined that the Government is entitled to the informer's privilege, the situation under the informer's privilege is not unlike that existing in other cases where matters privileged to begin with are sought or involved in a case—military secrets or matters going to national security, See *United States v. Reynolds*, 345 U.S. 1, (1953), internal memoranda of government agencies involving the decision making process, See *Boeing Airplane Company v. Coggeshell*, 108 U.S. App. D. C. 106, 280 F.2d 654, 660 (1960) and the like. However, the difference between these matters of executive privilege and the informer situation is that apparently the mere presence of the former in a case makes the privilege applicable, see *Reynolds*, 345 U.S. at 6-7, *Coggeshell*, 280 F.2d at 660, whereas the mere presence of the latter, an informer, in a case does *not* make the informer's privilege applicable. *Roviaro*, 353 U.S. at 59-62. Thus it may be that a claim of absolute executive privilege may be handled by the court *in camera*. The court examines the Government documents in question, ascertains that they do involve military secrets or the decision making process, for example, determines whether any of the documents or parts of them are relevant to the case and can be disclosed without violating the privilege, and disposes of the matter.

A claim of the informer's privilege, however, *cannot* be handled entirely by the court *in camera* because, as previously indicated, whether the privilege applies at all is a question which must be resolved by weighing and testing the facts of the case, i.e., an evidentiary question, before the second question of what evidence in the case the privilege applies to is reached.

It should be noted that the court describes the materials viewed *in camera* as documents "concerning the role of the informer or informers in the surveillance." The court then states the approach

he took in deciding whether the informer's privilege applies to persons involved in electronic eavesdropping:

"Rather than to limit the class to whom the privilege is generally applicable, the better approach is *to weigh the nature of the informer's role* in determining whether disclosure is appropriate under the standards established by the *Roviaro* decision Applying the above *to the facts of this case*, it is my view that the person or persons who assisted the Government in the eavesdropping of plaintiff's suite were informers within the accepted legal meaning of that word." (Emphasis added) (A. 66-67)

However, the court decided *in camera* more than just the question whether these persons are informers, it also decided that the informer's privilege should apply on the facts of this case. What was the "nature of the informer's role"? What are "the facts of this case"? What did the persons who assisted the Government *do* that made them informers within what the court deemed to be the accepted legal meaning of that word? Why, on the facts of this case, should the informer's privilege be granted to the Government? The record does not show these things, the court does not say, and the plaintiff does not know.

If due process of law means anything, it would seem to mean that a party has a right to know what the evidence is against him. Surely the plaintiff has a right to know what these persons did that makes them informers and entitles the Government to refuse to identify them. It cannot be that the Government can cut off all inquiry into this matter simply by saying these persons were informers.

Due process of law also means that a party has a right to cross-examine witnesses who testify against him. The persons who pre-

pared the documents which the district court received in evidence *in camera* were testifying through those documents and the plaintiff has a right to cross-examine these persons. In *Greene v. McElroy*, 360 U.S. 474 (1959), the Supreme Court was faced with a situation where a matter was resolved adversely to a party partly on the basis of documents from FBI files, including evidence obtained from unidentified informants. This evidence had not been made available to the opposing party because it allegedly might lead to the identity of confidential informants. The court quoted a statement made at the administrative hearing below:

"The transcript to be made of this hearing will not include all material in the file of the case, in that, it will not include reports of investigation conducted by the Federal Bureau of Investigation or other investigative agencies which are confidential. Neither will it contain information concerning the identity of confidential informants or information which will reveal the source of confidential evidence. The transcript will contain only the Statement of Reasons, your answer thereto and the testimony actually taken at this hearing." 360 U.S. at 486.

In ruling that all the evidence on which the decision was based must be disclosed to the opposing party, the court stated:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or

who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases [citations omitted] but also in all types of cases where administrative and regulatory actions were under scrutiny. [citations omitted].

"Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." 360 U.S. at 496-497.

This principle applies here. "[T]he evidence used to prove the Government's case must be disclosed to the [Plaintiff] so that he has an opportunity to show that it is untrue."

It is well established that cross-examination is a matter of right, not a mere privilege, *Alford v. United States*, 282 U.S. 687, (1931); *The Ottawa*, 3 Wall 268, 271, (1866); *J. E. Hanger, Inc. v. United States*, 81 U.S. App. D.C. 408, 160 F.2d 8 (1947); *Lindsey v. United States*, 77 U.S. App. D.C. 1, 133 F.2d 368 (1942); *DuBeau v. Smit-*

her and Mayton, Inc., 92 U.S. App. D.C. 213, 203 F.2d 395, 396 (1953). And see *Pointer v. State of Texas*, 380 U.S. 400, 405, (1965) where the Supreme Court said:

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

This rule applies in civil cases as well as criminal, *Greene v. McElroy*, *supra*; *DuBeau v. Smither and Mayton, Inc.*, *supra*, *The Ottawa*, *supra*; in fact, the courts cite civil and criminal cases interchangeably on the right to cross-examination. See, e.g., *Alford*, *supra*, and *DuBeau v. Smither and Mayton, Inc.*, *supra*. In *Derewecki v. Pennsylvania R. Co.*, 353 F.2d 436, 442 (3 Cir., 1965) a civil case, the Third Circuit stated that the right of cross-examination inheres in every adversary proceeding and that it is established beyond any necessity for citation of authorities that if a party is deprived of cross-examination he has been denied due process of law.

In *Reilly v. Pinkus*, 338 U.S. 269, 276 (1949) cited in *Greene*, the Supreme Court ruled that depriving a party of his right to cross-examination is not cured by having the fact finder examine the documents at issue, because among the purposes of cross-examination are eliciting testimony from the witness about the document and testing the accuracy and veracity of the witness testimony.

In *Sardo v. McGrath*, 90 U.S. App. D.C. 195, 196 F.2d 20, 22 (1952), this Court stated:

"... when appellant alleged that 'an *ex parte* investigation was made and an *ex parte* report of said investigation was considered in determining the issue of plaintiff's last entry into the United States', he was complaining of the denial of his right to cross-examine the authors of the report. There is ample authority for the proposition that such a denial violates due process if it can be demonstrated to have been prejudicial. And this, in turn, as appellee recognizes, depends upon whether the '*ex parte*' evidence is vital to the decision."

With respect to cross examination as to privileged matters, in *Summit Drilling Corporation v. Commissioner of Internal Revenue*, 160 F.2d 703, 706 (10 Cir., 1947), it was stated that:

"Where a witness testifies in part respecting a privileged document and in part respecting other matters, so much of the testimony as bears upon the document may be stricken but the remainder will be retained in the record. [citation omitted] And if the testimony is confined in its entirety to a privileged document and the authority of the witness to disclose the document is forbidden or so limited as to cut off the right of effective cross-examination by the party against whom the testimony is offered, all of the testimony is subject to objection or motion to strike."

There is also an interesting discussion by Judge Learned Hand in *United States v. Coplon*, 105 F.2d 628, 639-640, (2 Cir., 1950) of the use to which a court can put information obtained by an *in camera* examination of Government documents. In short, Judge Hand says such information cannot be used as the basis for a ruling by the court against the other party on an evidentiary question. But that is what the district court has done here.

Applying *Greene* and the other above cited cases on the right to cross-examination, it is clear that an evidentiary question in a case

cannot be resolved against a party on the basis of documents which have not been made available to that party for purposes of cross-examination.

Furthermore, due process of law requires that a court consider all the available evidence on a question before it, not just the evidence favoring one party. Mr. Pennypacker indicated at his deposition that all his activities in connection with the electronic eavesdropping on plaintiff's suite were not put down in writing. Presumably all the activities of the alleged informer were not put down in writing either. The common experience of anyone who has ever kept a file on an investigation compels the conclusion that the alleged informer may well have performed many services for the Government in connection with this eavesdropping which were not reported in writing and which are not reflected in the documents which were submitted to the court. Indeed, it may well be that the activities of the informers most relevant to this case, those which would most clearly require disclosure of the identity of those persons, or make the Sheraton defendants liable, perhaps for punitive damages, were not sufficiently significant in the context of FBI investigation to appear in the file at all. The only source of such evidence, apart from the alleged informers themselves, is Mr. Pennypacker and/or the other Government agents who dealt with them, and such evidence can only be obtained by having those agents testify. To evaluate the relevance and materiality of the alleged informers' identity and testimony to the issues in this case, the court must have before it *all* the evidence of *all* their activities in connection with the eavesdropping, not just some evidence of some of their activities.

By deciding the question whether the informer's privilege is applicable on the basis of information contained in Government documents viewed *in camera*, the district court denied the plaintiff due process of law.

III

THE DISTRICT COURT ERRED IN RULING THAT THE INFORMER'S PRIVILEGE SHOULD APPLY TO THE PERSONS CONNECTED WITH THE HOTEL WHO WERE INVOLVED IN THE ELECTRONIC EAVESDROPPING ON PLAINTIFF'S SUITE.

Even if the persons connected with the hotel who were involved in the Government's unlawful invasion of plaintiff's privacy are deemed to be informers within the meaning of the informer's privilege, there is no support in the record for the court's decision that the privilege should apply here. Whether the identity of an informer should be disclosed is to depend upon a balancing of the interests favoring disclosure against those favoring nondisclosure, the particular circumstances of the case, the relevance and materiality of the informer's testimony to the issues, and the fundamental requirement of fairness. *Roviaro v. United States*, 353 U.S. 53, 60-62 (1957), *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 122 U.S. App. D.C. 65, 351 F.2d 762, 768 (1965).

There are compelling reasons for disclosure here. These persons were involved in the eavesdropping, the very event which is the subject of this lawsuit. Their connection with the case is not peripheral or obscure but direct. The identity of these persons and their position in or connection with the hotel is not only relevant and material to the issues, it is essential to plaintiff's case against the hotel and may well be determinative of the liability of the Sheraton defendants to the plaintiff. The particular circumstances of the case have not been disclosed, but fundamental fairness requires that they be disclosed and that the identity of these persons be disclosed also. The one factor which might mitigate against disclosure of the identity of an alleged informer in a situation such as this, a danger of physical harm to the informer, is not present in

this case, as both the district court and the Government have in effect acknowledged. (See the courts opinion at A. 79-80.)

Neither the district court nor the Government has pointed to a single reason why, in the circumstances of this particular case, the identity of these persons should not be disclosed. The court has indulged in extensive analysis of other cases and the law and policy surrounding various aspects of the question. However, it is indisputable that the policy of the law today is that the decision in a particular case is to be made on the basis of the facts and circumstances of that particular case, not on the basis of abstract notions of policy and law.

The affidavits of the Attorney General and the Assistant to the Director of the FBI do not address themselves to this case at all but speak in general terms about the need for and importance of informers in law enforcement. As general statements of policy they are interesting, but they are not relevant here in view of the case by case principle of applying the informer's privilege laid down in *Roviaro*, to which these affidavits appear to take exception.

And as is often the case when statistics are relied on to support general principles, the conclusion which the reader is invited to draw does not necessarily follow from the evidence cited in support of it. The argument in Mr. DeLoach's affidavit (A. 55-57) is that requiring the disclosure of the identity of an FBI informer may seriously impair that agency's entire investigative technique of employing informers to fight crime, a technique essential to the Bureau's efficient performance of its assigned function. However, the identity of bona fide informers has been disclosed in numerous cases since *Roviaro*. Where the circumstances of the particular case have required it, there has been disclosure of the identity of FBI informers and confidential documents from FBI files. See, e.g., *United States ex rel. Coffey v. Fay*, 234 F. Supp. 543 (S.D.N.Y.

1964); *Clark v. Pearson*, 238 F. Supp. 495 (D.D.C. 1965); *O'Neill v. United States*, 79 F. Supp. 827 (E.D.Pa. 1948).

Yet the statistics quoted in Mr. DeLoach's affidavit show the use of informers by the FBI in the years immediately following Judge Weinfeld's 1964 decision in the *Coffey* case, for example, growing more extensive and more effective year by year. It would not seem to follow, then, that requiring the Government to disclose the identity of a single alleged FBI informer in a single case such as this, where fundamental fairness requires that he be named, would necessarily have a significant detrimental effect on the FBI's entire program of using informers, or its ability to carry out its assigned function.

In his deposition Mr. Pennypacker referred to more than one informer but in his affidavit (A. 57) he refers to only one. There is no way of telling whether the informer referred to is connected with the hotel, or if he is, whether he was the only person connected with the hotel involved in the eavesdropping. Thus the affidavit is so vague as to be meaningless as a basis for denying disclosure. These three affidavits are the sum total of the Government's showing on the record as to why disclosure should not be required in this case.

Since disclosure is to depend upon "the particular circumstances of each case," *Roviaro*, 353 U.S. at 62, and *Roviaro* is to apply in civil cases, *Westinghouse*, 351 F.2d at 769, whether disclosure was ordered or denied in some other case would not seem overly relevant unless there is some factual similarity between the other case and the situation before the court. Yet none of the cases discussed by the district court are even remotely similar to this case on their facts. Categorizing the civil cases in which disclosure has been ordered into "types" of cases is also somewhat artificial exercise, for nowhere in the cases is there any suggestion that disclosure is

only to be ordered in those certain types of cases, or that there is to be one rule for one type case and another for another type case. Indeed, this court indicated to the contrary in *Westinghouse*, 351 F.2d at 769. Moreover, in some ways there has not been a case of this "type" before, so what other court's have done in other "types" of cases should not be determinative of what should be done in this case, although it is worth noting that the court cannot point to any "type" of civil case where disclosure has been consistently or even frequently denied. The validity of the court's argument based on typing the civil cases where disclosure has been ordered would seem to depend on a presumption that there are also a significant number of civil cases of other types where disclosure has been denied, but there simply are not. In fact, the courts have gone both ways in exactly the same type case because of different fact patterns presented. See *Mitchell v. Bass*, 252 F.2d 513 (8 Cir. 1958) (disclosure required); *Mitchell v. Roma*, 265 F.2d 633 (3 Cir. 1959) (disclosure not required.)

The district court categorizes the civil cases in which disclosure has been ordered as "punitive" and "waiver" type cases but nowhere does the court give any reason *why* disclosure of the identity of informers should be limited to those two types of cases. Nor is it at all clear why one case is a punitive case and another is not. The court states

"Punitive civil actions are suits brought by private citizens or by the government under authority of a statute to punish noncompliance or to compensate those who suffered injury because of defendant's failure to abide by the statute's terms." (A. 70)

The limitation of the term "punitive" to actions brought "under a statute" seems rather arbitrary. The plaintiff here seeks punitive damages from the Sheraton defendants, and is suing the United States to vindicate his rights under the Constitution. If a violation

of the anti-trust laws is a sufficient reason for ordering disclosure, a violation of the Constitution would seem to be also. However, as previously indicated, it is not at all clear why the fact that a civil case is punitive by any definition should be determinative of whether the identity of an informer should be disclosed.

The district court cites *Boeing Airplane Co. v. Coggeshell*, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960), as a punitive informer's privilege case within its definition, but there was nothing in any way punitive about *Coggeshell*, and if the informer's privilege was involved, it was very obscurely and not by name. The underlying civil action was described by this court in its opinion as follows:

"the Section 108 proceeding is one to determine the amount of money, if any, which Boeing must return to the United States as a result of allegedly excess profits earned on contracts with the United States Air Force." 280 F.2d at 656-657.

There is no provision for any punitive or multiple damages in the Renegotiation Act of 1951, 50 U.S.C. App. § 1218, et seq., nor is the statutory scheme one of punishing noncompliance with any statute, or compensating "those who suffered injury because of defendant's failure to abide by the statute's terms." An action under the Renegotiation Act is a straight civil action for a sum of money. The statute provides for the *renegotiation* by the parties of government contracts where, in retrospect, it appears to the Government that the contractor may be realizing or have realized an excessive profit. The matter reaches the courts only when private renegotiation is unsuccessful and it is the *contractor* who brings the action to court to protest an adverse order of the Renegotiation Board. Indeed, the action is no more punitive than a civil tax case, for like a tax case, it is brought in the Tax Court by the filing of a petition for a redetermination of the amount of money, if any, owed to the United States.

Coggeshell was not a punitive civil case and this court's decision denying the privilege claimed was not related in any way to punitive considerations. The decision was based on the particular circumstances of the case, the court placing considerable weight on the importance of the information sought to be kept secret to the issues in the case. 280 F.2d at 660.

While, as the district court indicates, the courts have certainly proceeded with caution in applying *Roviaro* in criminal cases, as the seriousness of the matter requires, the courts have not been reluctant to order the disclosure of the identity of informers where the circumstances of the particular case warrant disclosure. See *Roviaro v. United States*, 353 U.S. 53 (1957), *Gilmore v. United States*, 256 F.2d 565, (5 Cir. 1958); *United States v. Robinson*, 325 F.2d 391 (2 Cir. 1963); *United States ex rel. Coffey v. Fay*, 234 F. Supp. 543 (S.D.N.Y., 1964) among many that could be cited.

In *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 122 U.S. App. D.C. 65, 351 F.2d 762 (1965) this court ruled that *Roviaro* is to apply in civil cases also, and in a number of civil cases the identity of informers has been disclosed. See *Westinghouse, supra*; *Mitchell v. Bass*, 252 F.2d 513 (8 Cir. 1958); *Mannefrid v. Teegarden*, 23 F. R. D. 173 (S.D.N.Y. 1959); *United States v. Swift & Co.*, 24 F. R. D. 280 (N.D.Ill. 1959) and *Clark v. Pearson*, 238 F. Supp. 495 (D.D.C. 1965), for example. In practically all of these the relevance and materiality of the identity of the informer has been less direct and compelling in the context of the case than it is here. See *Westinghouse, supra*, *Swift, supra*, for example. Moreover, neither in *Westinghouse* nor in any of the other civil cases is there any suggestion that disclosure is only to be made in certain types of cases, or that it is to be favored in one type of case and not in another.

By undertaking to categorize the civil cases, in which disclosure has been ordered into punitive and waiver cases, and excluding this case from both categories, the court attempts to create the impression that what plaintiff seeks here is an exception to the established rule, but that is simply not so. There is no such rule, and even if there were, this case would easily fit into either or both categories. As indicated previously, this is at least in part a punitive type case by any ordinary standard. As to waiver, plaintiff contends that the Government's undertaking to violate the Constitutional rights of a citizen deliberately and as a matter of policy, as it did in this case, should, as a matter of law, constitute an automatic waiver or forfeiture of any right the Government might otherwise have to claim the informer's privilege in a civil case growing out of such Governmental activity. (See Part V of this brief, below.)

The court's inquiry into plaintiff's "purpose" in suing the hotel corporation (A. 77) is out of place and improper. Plaintiff is suing the hotel corporations for compensatory and punitive damages for their part in the tort that was committed against him, which he has every right to do. As a matter of hornbook tort law, the fact that plaintiff is also suing the United States does not and cannot deprive him of his right to make out a case against the hotel. See 52 Am. Jur. Torts, §§ 110, 111, Prosser, Torts, 3rd ed., 1964, §§ 43, 44. That plaintiff has stated an "apparent" cause of action against the United States under the Federal Tort Claims Act and the fact that he "may" be compensated thereby for any provable damages arising from the tort are not a proper ground for the court to deny the plaintiff discovery to which he is entitled and which is necessary to enable him to make out his case against the hotel. As to compensatory damages, there has been no admission of liability on the part of the United States. In this regard, the court refers to "provable" damages and the point is well taken. Since nay evidence will probably have to come from person presently or formerly within the FBI

or the Justice Department, it may be difficult for plaintiff to prove the causal connection between the invasion of his privacy and the bad fortune and catastrophic financial losses he has suffered in the ensuing years, although plaintiff has little doubt such connection exists.

However, plaintiff also has a claim for punitive damages against the Sheraton defendants. The hotel had not only a contractual obligation to afford the plaintiff privacy in his suite but a moral obligation to do so, built up over the ten year period of plaintiff's continuous association with the hotel, and plaintiff believes that for the hotel not only to fail to protect plaintiff's privacy but also to actively assist an outside party is unlawfully invading his privacy, over an extended period, would be offensive to most people, even if the outside party was the FBI. If this is in fact what took place, and it appears that it is, plaintiff believes that a jury might well be inclined to award him substantial punitive damages against the hotel. The court cannot simply dismiss plaintiff's claim for punitive damages as "a minimal interest in discovering the identity of the informer" (A. 78) because the question is not one for the court but for the jury to decide. If on the basis of the facts which the court has seen the court is of the view that plaintiff's claim is insufficient as a matter of law, plaintiff has a right to know what those facts are.

Even if the persons connected with the hotel who were involved in the electronic eavesdropping on plaintiff's suite are deemed to be informers, their identities should be disclosed in this case.

IV

THE DISTRICT COURT ERRED IN RULING THAT THE ROLE PLAYED BY THE PERSONS CONNECTED WITH THE HOTEL AND THE CIRCUMSTANCES SURROUNDING THE GOVERNMENT'S USE OF SUCH PERSONS ARE PRIVILEGED.

In refusing to compel the Government to answer any questions at all about the role played by the persons connected with the hotel, or about the circumstances surrounding their use, on the ground that the Government is entitled to the informer's privilege in this case the court has in effect ruled that these matters are within the informer's privilege. There is no precedent in law or basis in reason for such a ruling.

This Court stated the extent of the informer's privilege clearly and concisely in *Westinghouse v. City of Burlington, Vermont*, 122 U.S. App. D.C. 65, 351 F.2d 762, 768 (1965):

"*Roviaro* establishes several points: (1) Only the identity of the informer is privileged."

See also *Roviaro*, 353 U.S. at 60; *Mitchell v. Bass*, 252 F.2d 513, 516 (8th Cir. 1958); *United States v. Swift & Company*, 24 F.R.D. 280, 284 (N.D. Ill. 1959). As the Supreme Court said in *Roviaro*, "the scope of the privilege is limited by its underlying purpose." 353 U.S. at 60. That purpose is to protect the informer from retaliation and thus encourage other citizens to come forward with information of criminal activity. *Roviaro*, 353 U.S. at 59.

Disclosing the informer's role in the events before the court and the circumstances surrounding his use by law enforcement officers where these matters are relevant, without disclosing the informer's identity, is entirely consistent with the purpose behind the privilege. Obviously, if the informer's identity is not disclosed, there can be

no retaliation against him regardless of how much is known about what he did. Thus the informer's privilege, even where it is applicable does not exempt such information from discovery. It is pertinent to note that in every reported case where the informer's privilege has been invoked there is a detailed statement as to the role played by the informer in the events before the court, whether the privilege is ultimately granted or denied. See, e.g. *Roviaro*, 353 U.S. at 56-58, (privilege denied), *McCray v. State of Illinois*, 386 U.S. 300, 302-304 (1967) (privilege granted). In this case, however, the Government has adamantly resisted disclosing any information about the role played by the alleged informers for a reason unrelated to the purpose underlying the informer's privilege. The facts as to what these persons did and their connection with the hotel may well make the Sheraton defendants liable to the plaintiff, even if their identities are not disclosed. The Government's refusal to disclose this information is not motivated by a desire to protect the informers from retaliation but to protect the Sheraton defendant's from liability. Yet at the Government's request the district court has refused to order disclosure of this information.

The conclusion seems inescapable that the district court has undertaken to protect the Sheraton defendants from liability here by judicial fiat—by refusing to grant the plaintiff discovery of information to which he is entitled as a matter of law even if the informer's privilege is applicable. The plaintiff submits that the court cannot do that. The liability of the Sheraton defendants to the plaintiff is to be determined by a jury, not by the district court's denying the plaintiff information which he has a lawful right to discover.

The court's opinion does not address itself to the question of plaintiff's discovery of the role played by the persons connected with the hotel and the circumstances surrounding their use by the Government, so there is no way of telling how the court justifies this

action. The Government attempted below to support its refusal to answer any questions at all by the contention that saying anything about these matters would result in disclosure of the identity of the persons involved. However, the Government carefully avoided ever getting around to explaining how answering the ten specific questions raised below and set forth in the Statement of the Case could possibly disclose the identity of anyone.

It is well established that the extent of a governmental privilege is not to be resolved by a blanket denial of discovery of any information about the allegedly privileged subject. The proper procedure is for the court to proceed question by question, ruling whether the answer to each particular question will involve a disclosure of the allegedly privileged information, in much the same way that a court proceeds where an individual invokes the privilege against self incrimination. *Reynolds v. United States*, 345 U.S. 1, 8-9, (1953).

To the same effect is this Court's statement in *Westinghouse, supra*,

"In applying the *Roviaro* standard to any documents produced and claimed to be privileged, the trial judge should consider the claim as it relates to each document." 351 F.2d at 771

See also *Continental Distilling Corp. v. Humphrey*, 17 F.R.D. 237 (D.D.C. 1955); *United States v. Standard Oil*, 23 F.R.D. 1 (S.D.N.Y. 1958); *Shiner v. American Stock Exchange*, 28 F.R.D. 34, (S.D. N.Y. 1961); *United States v. Lustig*, 16 F.R.D. 138 (S.D.N.Y. 1954); *Union Savings Bank of Parchogue, New York v. Saxon*, 209 F.Supp. 319 (D.D.C. 1962); *Young v. Motion Picture Association of America, Inc.*, 28 F.R.D. 2 (D.D.C. 1961).

The district court's blanket refusal to require the Government to answer any questions about the role played by the persons connected

with the hotel and the circumstances surrounding their use by the Government was error, entirely apart from the question whether the informer's privilege can be applicable here at all, or whether the privilege should be granted in this case.

V

THE IMPERATIVE OF JUDICIAL INTEGRITY REQUIRES THAT THE COURT DENY THE GOVERNMENT AN EVIDENTIARY PRIVILEGE IN THIS CASE WHERE THE GOVERNMENT INTENTIONALLY AND DELIBERATELY VIOLATED THE PLAINTIFF'S CONSTITUTION RIGHTS AS A MATTER OF POLICY.

There can be no question that the Government's electronic eavesdropping on plaintiff's hotel suite in 1963 was a violation of his Constitutional rights. Although at the time the law with respect to electronic eavesdropping had not developed to the extent it has today, the Supreme Court had ruled unequivocally in *Silverman v. United States*, 365 U.S. 505 (1961), that the use of devices involving an "unauthorized physical penetration" 365 U.S. at 509, of the premises being eavesdropped upon constituted a violation of the Fourth Amendment.⁴ Yet in spite of the Supreme Court's decision in *Silverman*, Government agents, acting with the full knowledge and authorization of their superiors high in the Government, installed a "spike mike" through the wall of plaintiff's suite and eavesdropped upon his activities for almost three months.

Individual law enforcement officers have occasionally violated the Constitutional rights of American citizens in the past, out of

⁴Developments in the law since that time have culminated in the Court's ruling in *Katz v. United States*, 389 U.S. 347 (1967) that electronic eavesdropping by any means is in violation of the Constitution in the absence of a prior judicial authorization.

ignorance, or carelessness, or overzealousness, but in this case officials at a policy making level in the Government *authorized* a deliberate and intentional violation of the Constitutional rights of an American citizen! Thus it was the Government itself, in a particularly institutional sense, rather than just an individual law enforcement officer, which violated the plaintiff's Constitutional rights here. See *Alderman v. United States*, ____ U.S. ____, 89 S.Ct. 961, 981-982 (1969), (Concurring opinion of Justice Fortas).

Now the plaintiff is seeking a civil remedy for the wrong that has been done him by the Government and the hotel, and this same Government has the audacity to come into court and claim a *privilege*, the privilege of not being required to disclose anything at all about the assistance it received from persons connected with the hotel in violating plaintiff's Constitutional rights, and incredibly, the district court has granted the Government the privilege it seeks,⁵ a privilege the scope of which is without precedent in law.

There can be no privilege in a court of law for a government that is lawless. For a court to grant a privilege to the Government where the Government has deliberately and intentionally violated the Constitution is for the court to abdicate its own responsibility to support and protect the Constitution. The courts have often held that it is contrary to the public interest to grant the Government privileges where the Government's conduct is wrongful. In *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), after an extensive analysis of the question of privilege under Rule 26, F.R.C.P., the following reasons for denying a privilege were listed: governmental misconduct, *Singer Sewing Machine Co. v. N.L.R.B.*, 329 F.2d 200, 208 (4 Cir. 1964); *Rosee v. Board of Trade*, 36 F.R.D. 684, 689 (N.D. Ill. 1965); *Bank Of Dearborn v. Saxon*,

⁵The privilege is really the Government's, not the informer's. *Roviaro*, 353 U.S. at 59, *Westinghouse*, 351 F.2d at 768.

244 F.Supp. 394 (E.D. Mich. 1965); perversion of governmental power, see *United States v. Proctor & Gamble Co.*, 25 F.R.D. 485, 489 (D. N.J. 1960); and an unfair litigating advantage, see *Olson Rug Co. v. N.L.R.B.*, 291 F.2d 655 (7 Cir. 1961), *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 64 (N.D. Ohio, 1964); *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513 (W.D. Tex. 1963). Surely this principle must control where the Government's conduct was not only wrongful but intentionally and deliberately in violation of the Constitution.

This case must be governed by what the Supreme Court has called "the imperative of judicial integrity," *Elkins v. United States*, 364 U.S. 206, 222 (1960), the requirement, as stated in *Lee v. State of Florida*, 392 U.S. 378, 385-386 (1968), that

"Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the laws of the United States'."

In *Elkins*, 364 U.S. at 223 the Court had said:

"Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold."

and:

"In a government of laws," said Mr. Justice Brandeis, "existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would

bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

Elkins, 364 U.S. at 223, quoting *Olmstead v. United States*, 277 U.S. 438 at 485 (1928) (dissenting opinion of Justice Brandeis).

As was said in *Mapp v. Ohio*, 367 U.S. 643, 659 (1961):

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

If the imperative of judicial integrity requires that the courts exclude illegally obtained evidence, *Weeks v. United States*, 232 U.S. 383 (1914), *Mapp v. Ohio*, 367 U.S. 643 (1961) *Elkins*, *supra*, as a deterrent to lawless conduct on the part of law enforcement officers, surely it must require that the courts deny a *privilege* whose principal effect will be to foster such conduct.

The Supreme Court has recently remarked upon the lack of success which other means of deterring lawless eavesdropping by law enforcement officers has had. In *Lee v. State of Florida*, 392 U.S. 378, 385-386 (1968), the court noted the earlier hope that compliance with the law in this area could be achieved through penal provision aimed at law enforcement officers who violate the law, but stated:

"that has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of § 605 [of the Communications Act] since the statute was enacted." 392 U.S. at 386.

Human nature being what it is, the threat of substantial financial liability to persons who assist law enforcement agents in unlawful electronic eavesdropping is likely to be a far greater deterrent to such conduct than all the laws that could be put on the books. It may not eliminate such practices altogether but it may well serve to

limit them to instances where no assistance from outside parties is required.

One thing wrong with the district court's decision, in the larger sense of resolving this case in a way compatible with fairness and the public interest, is that it appears to absolve the hotel of any wrongdoing here, and it is hard to believe that this eavesdropping occurred, *or could have occurred*, without the assistance or compliance of the hotel. And it almost certainly could *not* have occurred had the hotel been diligent in fulfilling its obligation to provide the plaintiff with reasonable privacy in his rooms. In this regard the district court's concern with deterring corporations or citizens from cooperating with law enforcement officers is misplaced, for only cooperation with lawful law-enforcement efforts is in the public interest. Nor is there any need for the so called informer to "prejudge" his assistance to determine whether it will later be considered tortious as the court states. (A. 78).

It will almost certainly be the law, if it is not already, that a warrant from a court will immunize a hotel or others so situated from civil liability for permitting lawful electronic eavesdropping by law enforcement officers, just as it does for permitting a physical search of a hotel room. Since the Government agents did not have a warrant in this case, the assistance by the hotel was tortious and may result in liability here. It should be noted, however, that at the time in question, if the Government had the good cause necessary to obtain a warrant *it did so*. See *Osborn v. United States*, 385 U.S. 323 (1966) (Events occurred in 1963). There is simply no need to rewrite the law on the informer's privilege to protect the "innocent" hotel, because the hotel was not innocent here. At least, it has not been shown to have been, and there is no reason to presume it was. If the hotel's involvement was entirely innocent, the jury will be likely to so find.

All specific questions of law aside, the district court's resolution of the problem presented here is not in the public interest. It fails to condemn a flagrant and arrogant disregard of the Constitution by high Government officials as the courts must, it encourages citizens to cooperate with lawless conduct on the part of law enforcement officers, which a court cannot do, and it attempts to wash everything out in the secrecy of a judge's chambers, which is not where justice is done in our system of law. This court should reverse the district court's decision and deny the Government any privilege in this case.

VI

THE DISTRICT COURT ERRED IN DENYING THE PLAINTIFF DISCOVERY OF DOCUMENTS RELATING TO WHEN THE MICROPHONE WAS REMOVED FROM THE WALL OF PLAINTIFF'S SUITE.

The plaintiff contends that the placing of a microphone in and through the wall of his suite constituted a trespass by the Government, See *Silverman v. United States*, 365 U.S. 505 (1961); *Fowler v. Koehler*, 43 App. D.C. 349, (1915) and that this trespass continued as long as the microphone remained in the wall. Although the Government in its answer to the complaint herein admits the installation of the listening device, and it was ascertained at the hearing prior to plaintiff's retrial and acquittal on tax evasion charges that the installation took place on February 7 and 8, 1963, the Government has nowhere disclosed when the microphone was removed. In his deposition testimony Mr. Pennypacker, the FBI agent in charge of the case, indicated that the "monitoring", i.e. listening, by the agents, ended on April 25, 1963, (A. 39) but that he had "no personal knowledge as to the ultimate disposition of the installation," (A. 40) that he did not recall getting any written documents as to what was done with it when the monitoring operations ceased,

(A. 40) and that he did not know whether it was removed (A. 41, 43).

Included in the district court's blanket denial of all discovery on the plaintiff's motion below was the denial of discovery of any documents relating to when the microphone was removed. (A. 48-49, 87). Plaintiff submits that this ruling was in error, for the resolution of this question is essential to plaintiff's remedy in this case.⁶

Although at the time he testified, Mr. Pennypacker did not recall seeing any documents relating to what was done with the microphone when the monitoring was terminated, the Government has not said there are none in its files, as it has concerning some of the other documents sought. If the Government agents left the microphone in place when the monitoring operation was terminated, there would appear to be only one reason for doing so—to enable the Government to resume listening in on plaintiff's affairs at any time it chose in the future.

In addition to constituting a continuing trespass, plaintiff contends that the presence of the microphone under such circumstances would constitute a further invasion of his privacy. Surely privacy means something better than living in a room wired for sound by the Government, whether the Government happens to be listening in all the time or not. Moreover, if the microphone was left in place, it remains to be determined whether in fact it was "monitored" again by the Government. Over three years passed be-

⁶Unlike the question of the identity of the persons at the Sheraton who were involved in the eavesdropping, the question of when the microphone was removed is relevant to both plaintiff's case against the Government and the case against the Sheraton defendants for it is a part of plaintiff's case on damages. It should also be noted that although the ruling by the district court was made after his *in camera* inspection of documents, the documents submitted *in camera* did not relate to the removal of the microphone (A. 60-61).

tween the period of eavesdropping admitted by the Government and the disclosure of that eavesdropping, three years in which plaintiff sustained major financial losses and other misfortunes, and if the microphone was left in place for further eavesdropping, plaintiff has a right to discover whether he was in fact being eavesdropped upon during this period or any part of it.

When the microphone was removed from the wall of plaintiff's suite is relevant to the issues in the case and it is not privileged, nor has there been any claim of privilege in connection with this information. Under Rule 34 of the Federal Rules of Civil Procedure, the plaintiff is entitled to discovery of any documents containing such information. The district court's denial of such discovery was in error and should be reversed.

CONCLUSION

The Government's claim of the informer's privilege in this case should be denied. The district court's failure to deny that privilege and the procedures adopted by the court to dispose of this motion were erroneous, as was the denial of discovery of documents relating to the question of when the microphone was removed. The decision of the district court should be reversed.

Edward P. Morgan

Gerald S. Rourke

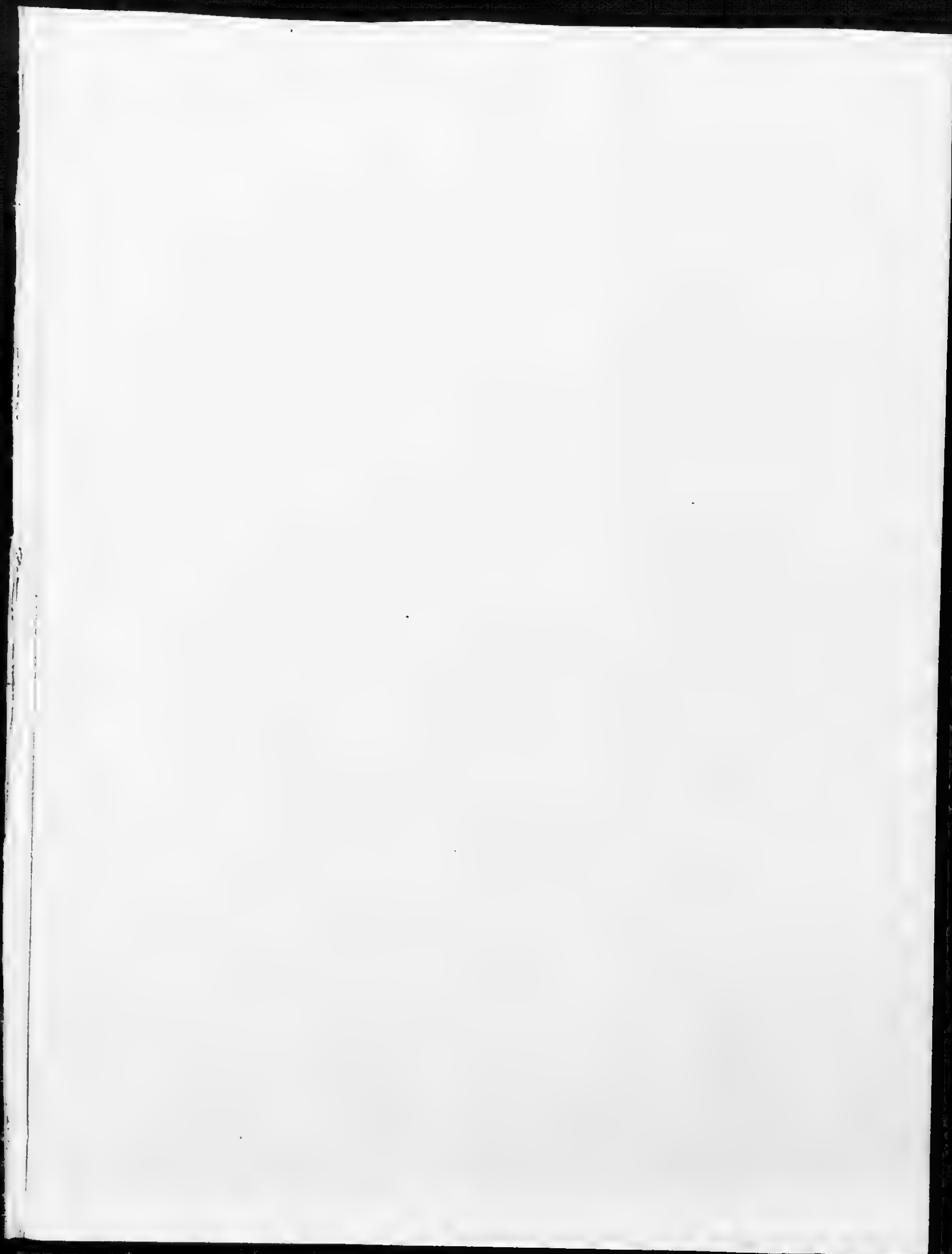
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,542

FRED B. BLACK, JR.

Plaintiff-Appellant

v.

SHERATON CORPORATION OF AMERICA, ET AL.

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF ISSUES PRESENTED*

1. Whether the district court abused its discretion (1) in holding that the United States, in pretrial discovery, properly invoked the privilege protecting the identity of confidential informants as a ground for declining to give testimony or to produce documents relative to the identity of, the role played by, or the circumstances surrounding the use of confidential

* This case was previously before this Court under number MISC. 3470, as a Petition for Immediate Appeal Under 28 U.S.C. § 1292(b).

informants of the Federal Bureau of Investigation; and (2) in not holding an evidentiary hearing before making its determination.

2. Whether the district court abused its discretion in holding that plaintiff had failed to show good cause for the production of certain documents.

COUNTERSTATEMENT OF THE CASE

Plaintiff, appellant herein, is suing the United States, and the Sheraton Corporation of America and the Washington Sheraton Corporation (hereinafter referred to as the Sheraton defendants) as a result of eavesdropping upon plaintiff at the Sheraton Carlton Hotel in Washington, D.C. Plaintiff is seeking damages for violation of Constitutional rights,^{1/} trespass, and invasion of privacy. (A. 8-20)^{2/}

The United States admitted the eavesdropping, but denied that plaintiff sustained any damage therefrom (A. 21-25).

Plaintiff has taken the deposition of two Special Agents of the Federal Bureau of Investigation. Philip M. King testified as to the rental of the space used by the Federal Bureau of Investigation and as to the specifics of the monitoring of the microphone involved. Edward W. Pennypacker testified concerning the reasons for the investigation of Mr. Black and concerning certain mechanics of the entire investigation. He

1/ The claim for violation of Constitutional rights is inappropriate in this action. See page 17, fn. 21, infra.

2/ The citation "A" refers to the Joint Appendix.

answered all questions posed, except that he declined to disclose whether he had contacted any one at the Sheraton Carlton Hotel with reference to the eavesdropping and, if so, who that person was and what his activities were. Mr. Pennypacker declined to answer that type of question on the ground that to do so would tend to disclose the identity of confidential informants of the United States. The deposition was adjourned pending plaintiff's endeavor to have the district court order Mr. Pennypacker to disclose the identity of confidential informants.^{3/}

Subsequently, plaintiff moved the district court for an order compelling the United States to produce certain documents (A. 48-50). The United States voluntarily produced all documents which in any way contained or summarized any conversations overheard during the eavesdropping. The United States declined to produce other documents asserting that they were irrelevant, that no good cause was shown for the production, that some documents did not exist, and that certain documents would or would tend to reveal the identity of confidential informants.

Plaintiff also moved for an order to compel Mr. Pennypacker to testify concerning the identity of the confidential informant

^{3/} The depositions of Special Agents King and Pennypacker are presently held by the Clerk of this Court under seal pursuant to an Order of this Court filed November 3, 1969. The relevant portions of the deposition of Special Agent Pennypacker are contained in the Joint Appendix at pages 37-39.

and his activities in the case (A. 43). The United States and Mr. Pennypacker moved for protective orders to prevent inquiry into privileged or irrelevant material.

The relevant basic facts before the district court as of that point were as follows. From February 7, 1963 to April 25, 1963, the United States conducted an electronic surveillance of plaintiff's hotel suite at the Sheraton-Carlton Hotel in Washington, D.C. The surveillance was conducted by employees of the Federal Bureau of Investigation acting within the scope of their employment for the United States. The surveillance involved the placing of a listening device in the suite of the plaintiff. The device involved a trespass (A. 22-23).

The surveillance involved was a part of an investigation of the plaintiff to determine whether any of the laws of the United States had been violated (A. 42, 57). In the process of that investigation, the Federal Bureau of Investigation received assistance and information from what is termed a confidential informant (A. 24, 58). This informant also assisted Special Agent Pennypacker in obtaining information concerning plaintiff (A. 58). The assistance and information provided by the informant were received under a pledge of strict confidence and secrecy (A. 58). The informant was not told about the electronic surveillance being conducted and would have had no occasion to obtain information relative to it or to know that it was being conducted (A. 58-59).

Confidential informants are of critical importance to the police in the detection, investigation and prevention of crime,

and are the single most important source of information and assistance in the field of law enforcement (A. 51-57).

On the other hand, plaintiff's need to know the identity of the informant arises from one consideration only--plaintiff needs to identify the informant as an employee of the Sheraton defendants in order to maintain his action against them.^{4/}

Maintenance of that action would accomplish three things for plaintiff: (1) it would give him cumulative defendants; (2) it would provide for a jury trial against those cumulative defendants as opposed to a trial by the court against the United States^{5/}; and (3) it would enable plaintiff to claim punitive damages against those cumulative defendants,^{6/} whereas

^{4/} This, of course, assumes the informant is an employee of the Sheraton defendants, a fact never admitted by the United States herein.

^{5/} 28 U.S.C. 2402.

^{6/} 28 U.S.C. 2674.

At page 37 of his brief, plaintiff seems to argue that he is entitled as a matter of right to have the question of his entitlement to punitive damages against the Sheraton defendants submitted to a jury. However, in the District of Columbia, punitive damages are awarded only as a deterrent. Afro-American Publishing Co. v. Jaffe, 125 U.S. App. D.C. 70, 366 F.2d 649 (1966); Collins v. Brown, 268 F. Supp. 198 (D. D.C., 1967), affirmed, U.S. App. D.C. , 402 F.2d 209 (1968); United Securities Corp. v. Franklin, 180 A.2d 505 (D.C.Mun. App., 1962); District Motor Co. v. Rodill, 88 A.2d 489 (D.C.Mun.App., 1952). And, plaintiff never explains how an award of punitive damages against an informant who knew nothing of the electronic surveillance (A. 58-59) would deter either that informant or other potential informants from rendering similar assistance or giving similar information in the future. Moreover, in relation to the context of this case, the conduct supposedly to be deterred now has full legislative sanction (Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2516).

his recovery against the United States is limited to compensatory damages.

After extensive briefing and argument the district court ordered in camera production of all records of the United States pertaining to confidential informants and their activities in the case (A. 60-61). A motion to modify that order (A. 61-63) was denied (A. 63).

After in camera inspection of the documents, the district court issued its opinion (A. 64-86).^{7/} Basically, the court found as follows: (1) The primary purpose of the informant's privilege is to "facilitate * * * private cooperation in law enforcement" and the desired cooperation embraced not only the giving of information, but also the provision of whatever assistance was necessary to achieve effective law enforcement; (2) The informant's privilege is a qualified one, even in civil litigation of the type involved here, and requires a balancing of the public interests in nondisclosure against the right of the individual to prepare his defense; (3) There is no general rule compelling the disclosure of the identity of confidential informants even in criminal cases where the liberty of the accused is at stake; (4) Disclosure is generally required in civil cases only in two types of

^{7/} The opinion of the district court has now been reported under the caption Black v. Sheraton Corporation of America, et al., 47 F.R.D. 263 (D. D.C., 1969). Hereafter, for the convenience of the Court, both the Joint Appendix and the reported citation will be included for any reference to the opinion.

situations, neither of which is involved here; (5) In balancing the interests of the parties, the plaintiff's interest in disclosure was relatively minimal and the privilege against disclosure is stronger in a civil action of this type; (6) That considering all the factors involved in the case and the positions of the parties, the interests in protecting the identity of confidential informants is paramount; and (7) Plaintiff had not made a sufficient showing of good cause to justify the production of documents by the United States. The district court then certified its decision for interlocutory appeal (A. 87-88), the plaintiff petitioned this Court for an interlocutory appeal under 28 U.S.C. 1292(b) (A. 89), and this Court agreed to hear the case (A. 89).

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION (1) IN HOLDING THAT THE UNITED STATES, IN PRE-TRIAL DISCOVERY, PROPERLY INVOKED THE PRIVILEGE PROTECTING THE IDENTITY OF CONFIDENTIAL INFORMANTS AS A GROUNDS FOR DECLINING TO GIVE TESTIMONY OR TO PRODUCE DOCUMENTS RELATIVE TO THE IDENTITY OF, THE ROLE PLAYED BY, OR THE CIRCUMSTANCES SURROUNDING THE USE OF CONFIDENTIAL INFORMANTS OF THE FEDERAL BUREAU OF INVESTIGATION; AND (2) IN NOT HOLDING AN EVIDENTIARY HEARING BEFORE MAKING ITS DETERMINATION.

A

THE PERSONS WHO ASSISTED AND GAVE INFORMATION TO THE FEDERAL BUREAU OF INVESTIGATION ARE CONFIDENTIAL INFORMANTS WHOSE IDENTITY SHOULD BE PROTECTED.

As heretofore noted, the district court declined to order the production of documents and to compel the giving of

testimony which would have disclosed the identity of individuals who, during the course of an investigation of possible violations of the federal criminal laws, gave assistance and information to the Federal Bureau of Investigation under a pledge of secrecy. In challenging this action on the part of the court, plaintiff urges first that these individuals cannot be deemed confidential informants. According to plaintiff, only those persons who give information directly of the commission of a crime are to be called confidential informants, and the identity alone of such informants is to be protected and then only when they have not also assisted the police or have not been participants in the actual offense with which the defendant is charged.

We submit that this restricted scope which plaintiff would give to the term confidential informant is wholly untenable. Rather, we submit that persons who assist or give information to the Federal Bureau of Investigation during the course of a criminal investigation under a pledge of secrecy should be classed as confidential informants and their identities should be protected from disclosure.

Our position on this question is, we believe, directly supported by the policy considerations underlying the confidential informant's privilege--considerations which preclude adoption of the distinction which plaintiff would draw. It is uniformly recognized that the informant's privilege exists for the benefit of the general public^{8/} as "a vital part of

^{8/} Westinghouse Electric Corp. v. City of Burlington, Vermont,
122 U.S.App.D.C. 65, 351 F.2d 762, 768 (1965).

society's defensive arsenal."^{9/} The informant's privilege is a concomitant of society's overwhelming interest in effective law enforcement.^{10/} To achieve this end, society must protect the sources of information^{11/} and assistance^{12/} for its law enforcement agencies. As the Supreme Court has said:

It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country. It is likewise his right and duty to communicate to the executive officers any information which he had of the commission of an offence [sic] against those laws; and such information, given by a private person, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government. [In re Quarles and Butler, supra, 158 U.S., at 535-6.]

The district court pointed to five decisions in which the court had concluded that individuals who, as here, had given assistance to the police had the status of confidential

^{9/} McCray v. Illinois, 386 U.S. 300, 307 (1967)

^{10/} Roviaro v. United States, 353 U.S. 53, 59 (1957).

^{11/} Westinghouse Electric Corp. v. City of Burlington, Vermont, supra, 351 F.2d, at 768.

^{12/} In re Quarles and Butler, 158 U.S. 532, 535 (1894).

informants. It is true, as plaintiff points out, that disclosure of their identity was ordered in each of the cases. But it was for reasons which have no application to the present case. Specifically, in four of the cases (Roviaro v. United States, 353 U.S. 53 (1957); Gilmore v. United States, 256 F.2d 565 (C.A. 5, 1958); United States v. Conforti, 200 F.2d 365 (C.A. 7, 1952); Wilson v. United States, 59 F.2d 390 (C.A. 3, 1932)) the "informant" was also a participant in the crime charged. In view of that circumstance, it was concluded in each instance that dictates of fairness to the criminal defendant required that the informer's identity be made known. Any doubt that Roviaro was grounded on that consideration, and not on a belief that the giving of assistance precluded the person from being characterized as an informant is dispelled by the later Supreme Court holding in Rugendorf v. United States, 376 U.S. 528, 534 (1964):

Apparently this was an attempt to bring the facts of the case within Roviaro v. United States, 353 U.S. 53 (1957), where the informant had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted. But there was not even an intimation of such a situation at the trial here. (Emphasis supplied.)

The fifth case cited by the district court (Howard v. Allgood, 272 F. Supp. 381 (E.D. La., 1967)) is said by plaintiff to support his other attempted distinction relative to the definition of an informant--that one who does not give information of a crime is not an informant. This claim is plainly without merit. In the first place, the Howard opinion

merely states that the person was not ". . . an informer insofar as the crime or any element thereof was concerned" (272 F. Supp., at 385). It does not suggest that the person was not a confidential informant at all.^{13/} Second, if Howard were read to stand for the proposition for which plaintiff contends an intolerable burden would be placed upon the potential informant. He would then be compelled to determine unilaterally whether a crime had been committed with full recognition that, if his unaided determination were found by a court to be incorrect, his identity would be disclosed. Certainly, the public policy subserving the informant's privilege militates against such an incongruous result.

Plaintiff's reliance upon Morss v. Forbes, 24 N.J. 341 132 A.2d 1 (1957) stands on no better footing. It may be that that decision would support the proposition that wire tappers are not confidential informants. But that scarcely helps plaintiff. Here, plaintiff knows the names of the monitors whose identity were sought in Morss, he knows the names of the installers and he knows the name of the Special Agent assigned to conduct the investigation of him. What he does not know and desires to know is the names of the informants who assisted the Federal Bureau of Investigation and gave it

^{13/} In fact the language of the court can logically be construed as sustaining a proposition diametrically opposed to plaintiff's contention. It can be said that the federal court recognized two types of confidential informants--those who give information of specific violations of law, and those who only give general information--and would compel disclosure of the identity only of those in the first category.

information during the course of its investigation. Morss is plainly no authority for such a disclosure.^{14/}

Nor are plaintiff's policy arguments persuasive.^{15/} Plaintiff, in effect, seeks to impose a balancing of his interests against those of the informant whom he terms a participant. He argues that upholding the privilege here would create an entirely unwarranted boon for the informant. In so doing, plaintiff completely negates the purpose of the privilege involved. Once again, the privilege is designed to protect the free flow of information and assistance^{16/} to the government and thereby foster the public interest in

^{14/} Morss also recognized that the Roviaro decision is limited to criminal cases (132 A.2d, at 12), something which plaintiff and this Court (Westinghouse Electric Corp. v. City of Burlington, Vermont, supra, 122 U.S. App. D.C. 65, 351 F.2d 762) are apparently unwilling to do.

^{15/} It should be noted here that when the United States advanced and the district court referred to certain policy considerations which would militate against disclosure, plaintiff rejected them out of hand saying they were irrelevant to the facts of the case. Apparently the only policy with which plaintiff agrees is his policy.

^{16/} Plaintiff does admit that the provision of assistance other than the alleged participation of the informant in the eavesdropping may be privileged (Brief of Appellant, p. 6). How or why plaintiff distinguishes now between subcategories of assistance is unstated. And this admission by plaintiff that assistance given by a person may be privileged runs directly counter to the entire thesis of the argument he presents in Part I of the Brief of Appellant to the effect that assistance is not included in the usual connotation of "confidential informant".

effective law enforcement; it was neither created nor intended for the specific benefit of the informant.^{17/}

Thus, the informant is properly termed such, both in accord with the policy of the law and within the literal language of the law. The effectuation of the policy subserving the informant's privilege simply does not permit room for the attempted distinctions urged upon this Court by plaintiff or for the arguments he makes which could prevail only after complete denial or reversal of that policy. Any other interpretation would serve to nullify the protection of thousands of people who yearly cooperate with the police on a confidential basis, and would consequently serve to hinder effective law enforcement.

E

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THE FACTS OF THIS CASE IN DECLINING TO ORDER THE UNITED STATES TO REVEAL THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

For the foregoing reasons, we submit that the individuals who gave the Federal Bureau of Investigation information and assistance during the course of its criminal investigation and under a pledge of secrecy were properly regarded by the Court below as confidential informants. We now show that the district court properly concluded that their identity was not to be

^{17/} See fn. 8-12, *supra*, and associated text. See also: *Vogel v. Gruaz*, 110 U.S. 311 (1884); *Scher v. United States*, 305 U.S. 251 (1938).

disclosed. This is because (1) in civil, as distinguished criminal, actions there is an absolute privilege against such disclosure; and (2) in any event, at the very least there is a conditional privilege in this area and the district court did not abuse its discretion in applying it in the circumstances of this case.

1. As this Court has pointed out, originally the privilege protecting the identity of an informant was deemed to be an absolute one. Westinghouse Electric Corp. v. City of Burlington, Vermont, supra, 122 U.S. App. D.C. 65, 351 F.2d 762, 767-8, citing Vogel v. Gruaz, 110 U.S. 311 (1884) and In re Quarles and Butler, 158 U.S. 532 (1895). In Westinghouse, however, the Court held that, even with respect to civil actions, the privilege was rendered nonabsolute by Roviaro v. United States, supra. We submit that this holding should be reconsidered, particularly in light of the post-Roviaro decision in McCray v. Illinois, 380 U.S. 300 (1967).

In the first place, Roviaro was a criminal case, whereas the Vogel case (which established an absolute privilege protecting the identity of informants for this country) was a civil action for defamation.^{18/} Roviaro's language reflects

^{18/} Vogel itself was cited as a viable privilege case in both Roviaro, 353 U.S., at 59 and McCray, 386 U.S., at 309.

that the decision was intended to be no broader than required by the facts of that case--a criminal action where the informant was a participant^{19/} in the crime charged and the identity of the informant was vital to the defense against the criminal charge:

Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused. . . [353 U.S., at 60-61.]

* * * * *

We believe that no fixed rule with respect to disclosure is justifiable.^{20/} The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. [353 U.S., at 62.]

Second, Roviaro can not properly be construed as governing in a civil action since it was decided under the power of the Court to supervise the evidentiary rules for federal criminal trials. See McCray v. Illinois, supra, 386 U.S., at 311, 312. And, as the Court said in Reynolds v. United

^{19/} In Rugendorf v. United States, supra, 376 U.S., at 534, the Court spoke of Roviaro as limited to situations where the informant was a participant in the crime charged.

^{20/} On the other hand, with the absolutely minimal showing made here to justify disclosure, plaintiff is in effect asking this Court to rule that the identity of the informant must always be revealed in a civil action.

States, 345 U.S. 1, 12 (1953), decided a scant four years before Roviaro, the rationale of criminal cases does not apply to civil actions:

Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has a duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the government is not the moving party, but is a defendant only on terms to which it has consented.

Third, the Supreme Court itself has interpreted Roviaro as being limited to its facts. Rugendorf limited it to a situation where the informant was a participant in the crime charged. McCray, when it held that Roviaro considered only "one aspect of the informer's privilege" (386 U.S., at 309), footnoted Vogel (a civil absolute privilege case) as support for the proposition that the informer's privilege has "long been recognized in the federal judicial system."

In short:

(1) Roviaro ordered disclosure only in a situation where the informant himself participated in the alleged crime and, moreover, the Court there declined to formulate a general rule of disclosure even for the criminal cases to which the decision was limited;

(2) Rugendorf and McCray confirm that Roviaro applies only in the sphere of criminal actions; and in McCray, the

Court cited Vogel, an absolute privilege case, as a viable example of privilege;

(3) Reynolds holds that the rationale of disclosure in criminal cases is inapplicable in a civil case. Accordingly, we submit that, notwithstanding Westinghouse, the Roviaro decision does not alter the rule of absolute privilege in civil cases such as this.

2. If the Court agrees with the foregoing, its inquiry may terminate. If it disagrees, it must determine whether the district court abused its discretion in the balancing it drew under the principles enunciated in Roviaro. We submit that there was no such abuse of discretion for the following reasons.

First, disclosure of the identity of confidential informants is not generally compelled in civil actions. As the district court properly found, disclosure is generally ordered (if it is at all) only where the privilege has already been found to have been waived or where someone seeks a remedy under such laws as the treble damage provision of the Sherman Anti-trust Act (15 U.S.C. 15) or under the Fair Labor Standards Act (29 U.S.C. 216).^{21/} (A. 70-74, 47 F.R.D., at 267-269).

^{21/} Plaintiff argues that his attempt to vindicate his rights under the Constitution would qualify him for disclosure under this standard. However, in relation to plaintiff's case, the Constitution is not self-executing in terms of damages (Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 409 F.2d 718 (C.A. 2, 1969); cf. Wolf v. Colorado, 338 U.S. 25 (1949)). Thus, plaintiff must rely upon his common law allegations of invasion of privacy and trespass.

Failing to come within those categories, plaintiff argues there is no rule preventing disclosure of the identity of confidential informants of the Federal Bureau of Investigation (Brief of Appellant, pp. 31-2),^{22/} that disclosure is ordered^{23/} where the circumstances warrant (Brief of Appellant, p. 35), and that disclosure has been made in a number of civil cases (Brief of Appellant, p. 35).^{24/} But, basically, all three arguments miss the point of the district court's opinion. The focal point is that plaintiff cannot point to one single case involving an unsuccessful assertion of the informant's privilege which was not either a criminal action or a civil action involving a waiver or the enforcement of civil penalties.

On the other hand, the list of civil cases in which disclosure of the identity of the informant was not ordered covers an extensive range of situations. Worthington v.

22/ Plaintiff cites three cases in support of this contention. U.S. ex rel. Coffey v. Fay, 234 F. Supp. 543 (S.D. N.Y., 1964) was a criminal case directly within the rationale of Roviaro. Clark v. Pearson, 238 F. Supp. 495 (D. D.C., 1965) was a waiver case. In O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa., 1948) the privilege claimed was that of the attorney's work product. None of the three cases is apposite here.

23/ The four cases cited by plaintiff here are all criminal cases.

24/ Plaintiff again cites four cases. Westinghouse is a waiver and a punitive case. Mitchell v. Bass, 252 F.2d 513 (C.A. 8, 1958) was a waiver case and involved executive privilege, not the informant's privilege. United States v. Swift & Co., 24 F.R.D. 280 (N.D. Ill., 1959) was a punitive case and dealt with attorney's work product, not the informer's privilege. Clark v. Pearson, supra, 238 F. Supp. 495 was a waiver case.

Scribner, 109 Mass. 487 (1872)^{25/} (false misrepresentation and slander); Stelloh v. Liban, 21 Wis.2d 119, 124 N.W.2d 101 (1963)^{26/} (false arrest and imprisonment); Foltz v. Moore McCormack Lines, 189 F.2d 537 (C.A. 2, 1951), cert. den. 342 U.S. 271 (causing firing by malicious false representation); Vogel v. Gruaz, supra (defamation); Grogan v. United States, 261 F.2d 86 (C.A. 5, 1958), cert. den. 359 U.S. 944 (forfeiture

^{25/} As here, there was a conspiracy allegation in Worthington. However, the case was treated as one of false misrepresentation and slander. This is because conspiracy in a civil action adds nothing to the substantive tort alleged. See Rutkin v. Reinfield, 229 F.2d 248, 252 (C.A. 2, 1956), cert. den. 352 U.S. 844, where the court said:

The damage for which recovery may be had in a civil action is not the conspiracy itself, but the injury to the plaintiff, produced by specific overt acts. [Citations omitted.] The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible in damages for any overt act or acts.

^{26/} There, the plaintiff endeavored to rely upon Roviario to obtain the informant's identity. The court said (124 N.W.2d, at 105):

We hold the privilege of nondisclosure of identity applies to a civil suit for the same reason it exists in a criminal action. However, the exceptions which prevail in a criminal action do not have as sound a basis in a civil suit. True, a man's purse is important, but his liberty and innocence command greater recognition on the scale when balancing the various elements of public policy in a given case. In exercising its discretion a trial court should not require the police to breach a confidence upon which the information was given.

of property); Lewis v. Roux Trucking Corporation, 226 N.Y.S. 70 (1927) (wrongful death); Application of Langert, 173 N.Y.S.2d 665 (1958), appeal dismissed 182 N.Y.S.2d 25 (1959) (defamation); Dellastatious v. Boyce, 152 Va. 368, 147 S.E. 267 (1929) (trespass and false arrest); Elrod v. Moss, 278 F. 123 (C.A. 4, 1921) (illegal search, arrest and imprisonment); Takahoshi v. Hecht Co., 60 App. D.C. 176, 50 F.2d 326 (1931) (false arrest and imprisonment); In re Gurnsey's Petition, 223 F. Supp. 359 (D. D.C., 1963) (wrongful discharge).^{27/} Moreover, the privilege is stronger in a civil case. Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa., 1962).^{28/} Thus, plaintiff has not shown that this is a civil case in

^{27/} In this case, without a citation of Roviaro, the court held that Vogel created an absolute privilege for the identity of the informant and the information which he gave. Moreover, the information was known to relate only to the moral character of petitioner, and not to the violation of any law.

^{28/} The court said (203 F. Supp., at 407):

The Federal Courts have consistently indicated that the strength of this [informant's] privilege is greater in civil cases as this than in criminal cases such as Roviaro . . . where the informer had been a participant in the criminal act.

The reason for such holdings is self-evident. Liberty, after all, outweighs the purse on the scale of values. Accordingly, a criminal defendant's interest in securing disclosure of the identity of an informant is greater per se because his liberty is at stake. The corollary is that the privilege against disclosure is therefore per se stronger in a civil case.

which the privilege should be overturned. On the contrary, the weight of authority runs counter to the position argued by the plaintiff.

There is a second reason why the district court did not abuse its discretion in upholding the privilege. Assuming Roviaro applies and the district court was required to balance the interests involved, the record clearly supports the determination of the court that the interests in favor of non-disclosure clearly outweighed those in favor of disclosure.

Special Agent Pennypacker, in his affidavit (A. 57-59) stated that he is the person who developed the informant, and that the informant gave him information and rendered assistance under a pledge of secrecy. Cartha D. DeLoach, Assistant to the Director, Federal Bureau of Investigation, in his affidavit (A. 53-57) pointed to the importance of the informant generally in the work of the Federal Bureau of Investigation. John N. Mitchell, Attorney General of the United States, in his affidavit (A. 51-53) set forth the directions he and his predecessors had issued to Special Agent Pennypacker not to reveal the identity of the informant and noted the critical importance of informants in effective law enforcement.

Plaintiff's attempt to counter this showing is unavailing against the strong policy reasons--grounded in the necessities of effective law enforcement--for not disclosing the identity of the confidential informant here. Plaintiff can point only to his need to obtain the information to assist his case against the Sheraton defendants. But, as the district court determined,

this need is far outweighed by the considerations precluding disclosure.

Insofar as plaintiff's claim for compensatory damages is concerned, as the court noted, that claim is cumulative. The reason is clear: if plaintiff does not now have a valid case against the United States (in view of the admissions which it has made), he plainly has no case against anyone. In short, the addition of the Sheraton defendants can not enhance any expectation that plaintiff might have respecting the recovery of compensatory damages.

As to plaintiff's punitive damage claim, the court below held that his monetary interest in that claim, considered in the light of the circumstances of this case, was a relatively "minimal interest" (A. 78, 47 F.R.D., at 271), when compared with the rather vital interest present in Roviaro. Plaintiff does not, as he cannot, show that the court struck an improper balance in this regard.

Nor is there merit to plaintiff's argument that the United States should not be allowed to invoke the privilege in this case because its conduct should be deemed to result in an automatic waiver of the privilege.^{29/} This argument is based on

^{29/} Plaintiff seeks also to create his own false atmosphere. Part of his contention here is based upon his unfounded assertion that the United States is not trying to uphold the privilege so much as it is trying to protect the Sheraton defendants. The district court, citing the decision of this Court in Westinghouse, concisely answered this argument (A. 79-80, 47 F.R.D., at 272). It noted that the benefit to the informant is only indirect, peripheral and incidental to the main interest to be safeguarded by upholding the privilege--the public interest in effective law enforcement.

a charge of a violation of plaintiff's Constitutional rights (Brief of Appellant, pp. 41-46). However, as noted above, the Constitution is not self-executing in terms of damages here and plaintiff must rely upon the common law allegations of invasion of privacy and trespass. See fn. 21 supra.

In this connection, none of the eight cases cited by plaintiff (Brief of Appellant, pp. 42-43) supports his theory that the government may be compelled to disclose information when its conduct is wrongful. Seven deal entirely with executive privilege which is not at issue here.^{30/} One of the seven (Bank of Dearborn v. Saxon, 244 F. Supp. 394 (E.D. Mich., 1965)) specifically distinguished an informer's privilege situation and did not order disclosure of the informant material to the other side. And in Zeiss, supra, the case referred to by plaintiff as containing an extensive analysis of the question of privilege,^{31/} no production of privileged material was ordered.

^{30/} Three of the eight cases (Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D. D.C., 1966); Timken Roller Bearing Company v. United States, 38 F.R.D. 57 (N.D. Ohio, 1964); United States v. San Antonio Portland Cement Company, 33 F.R.D. 513 (W.D. Tex., 1963)) also hold that the correct procedure to follow where privilege is asserted is for the court to view in camera what is asserted to be privileged. One of the three cases (Timken) specifically holds this as to informer's privilege material. Thus, in addition to not sustaining plaintiff's claim here, these three cases are additional authority against plaintiff's argument that the in camera inspection in this case was improper. See Section I C, infra.

^{31/} The court in Zeiss even gave great weight the judgment of the Attorney General "as to the impact of the production sought upon the public interest" (40 F.R.D., at 327), something which plaintiff contends this Court should not do. As footnote authority for this holding, the court refers to the decision in Capitol Vending Co. v. Baker, 35 F.R.D. 510 (D. D.C., 1964), a case in which plaintiff here was a named defendant.

Finally, we see no substance to plaintiff's argument based upon what he calls the imperative of judicial integrity. First, it is merely another facet of his Constitutional rights argument, rights which, as already shown, cannot be vindicated in this action except as common law torts. Second, plaintiff tries to equate the exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914) with what he hopes will be the "deterrent" rule announced in this case, without ever showing how the deterrent would be effective as to informants who knew nothing of the eavesdropping. However, the Constitution is a shield, not a sword. And, notwithstanding his disavowal, plaintiff really desires to place all the burden of the informing on the informant who, as in this case, may be completely ignorant of the facts of what the police are doing. He would force the informant to decide unaided whether what information he gives is of the violation of a crime, and thus to determine unaided whether there has been a crime. He would prevent anyone from giving any type of secret assistance to the police, because assistance is not informing and there would thus be no reason for secrecy. Third, as the court noted in Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra, 40 F.R.D. 318, 328:

The basic fallacy in the claimants' approach results from the fact that they endeavor to exploit what they consider to be the weaknesses in the Government's case without making any real case of their own.

Fourth, the plaintiff assumes that the governmental conduct to which he objects continues unabated to this day. This assumption is wholly without foundation; any eavesdropping in an

investigation such as the one involved here in which the United States is involved today is sanctioned under 18 U.S.C. 2516. Hence, there is nothing to deter.

Thus, the district court's determination in the facts of this case not to compel disclosure of the identity of the informant was proper for two separate reasons: (1) contrary to the determination of the district court, identity of an informant is absolutely privileged in a civil case; or (2) the district court correctly upheld a conditional privilege for the identity of the informant here because disclosure has not been compelled previously in a civil case of this type and because, after a balancing of the interests of the parties in the matter, the interests in favor of non-disclosure are paramount.

C

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN NOT HOLDING AN EVIDENTIARY HEARING CONCERNING THE ROLE OF THE INFORMANT AND THE CIRCUMSTANCES SURROUNDING HIS USE.

We have shown above that the district court did not abuse its discretion in concluding that the identity of the confidential informant here involved was entitled to protection. We now demonstrate that the district court was further correct in determining that (1) the disclosure of the role of the informant or the circumstances surrounding his utilization would tend to reveal his identity; and (2) no evidentiary hearing was required on that question.

1. In the court below, plaintiff contended that there were numerous questions which could be propounded and answered without disclosing the identity of the informant. Specifically, plaintiff pointed to the ten questions which are set forth in full in his brief in this Court (pp. 5-6). These questions related essentially to whether the informant was employed by the Sheraton-Carlton Hotel, what he did and the circumstances in which he was called upon to act.

The district court properly rejected this position. As this Court held in Westinghouse Electric Corp. v. City of Burlington, Vermont, supra, 351 F.2d, at 768, under Roviaro the informer's privilege extends to anything which would "tend to reveal" his identity. And there can be doubt that, for example, the disclosure of the employer of the informant would tend to identify him.

Moreover, all of the documents in the Federal Bureau of Investigation files relating to the informant were examined by the district court in camera. The court specifically found that disclosure of that information would "tend to identify the informant" (A. 86, 47 F.R.D. at 275). A list of these documents is in the possession of the Clerk of this Court under seal and the documents themselves will be made available for in camera inspection by the Court upon its request and under an appropriate protective order. We think that, should this Court choose to make its own in camera examination, it will likewise conclude that the information contained in the documents--information to which resort would have to be made in

answering plaintiff's questions--would identify the informant.

2. Plaintiff's contention that there should have been an evidentiary hearing on the question of the privilege should be rejected for two reasons: (a) The issue is not properly before this Court; and (b) The district court was required to hold an in camera hearing.

a. The district court's order compelling in camera production was entered on June 6, 1969 (A. 60-61). Plaintiff then filed a motion to modify that order on June 19, 1969 (A. 61-63). The response of the United States was filed on June 25, 1969, and oral argument was held on June 27, 1969. The district court's order denying the motion to modify was issued on June 30, 1969 (A. 63). No attempt was made by plaintiff to have the district court certify its order for interlocutory appeal under 28 U.S.C. 1292(b). Thus, the order for in camera production has not been certified for interlocutory appeal by the district court, unless it is somehow embraced within the certification entered by the district court on August 11, 1969. The United States submits that it is not and could not have been so included.

This Court has held that 28 U.S.C. 1292(b) specifically requires that an order be certified by the district court before an interlocutory appeal may be taken. Courembis v. Independence Avenue Drug Fair, Inc., 115 U.S. App. D.C. 67, 316 F.2d 658 (1963). What the district court certified here was its decision of July 24, 1969. That decision did not grant the in camera hearing of which plaintiff now complains.

It merely set forth the district court's determination of the issues before it after it had held an in camera hearing. The entire purpose that would have been served by an appeal of the order for an in camera review was vitiated by that review having been held. Thus, the district court's order for in camera production could not have been certified under its order of August 11, 1969.

b. In any event, the district court, having declined to recognize an absolute privilege protecting the identity of confidential informants from disclosure, was required to hold an in camera review. The reason is obvious: any other type of review would have destroyed the privilege in the course of the review.

To support his contention that the district court erred in holding an in camera review, plaintiff cites four cases. Roviaro v. United States, supra; Westinghouse Electric Corp. v. City of Burlington, Vermont, supra; United States v. Reynolds, supra; Boeing Airplane Company v. Cogheshell, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960). However, not one of the four cases supports the plaintiff's position here, and, in fact, each fully sustains, indeed requires, the action taken by the district court. Roviaro specifically intimates that the question of the informer's privilege should be submitted to the court in camera. Roviaro was recently reaffirmed in this regard by Alderman v. United States, 394 U.S. 165, 183 fn. 14 (1969). This Court's decision in Westinghouse similarly indicates that the documents involved in a claim of informant's

privilege should be submitted to the court in camera (351 F.2d at 770). Indeed, Westinghouse cited Machin v. Zuckert, 114 U.S. App. D.C. 335, 316 F.2d 336, cert. den. 375 U.S. 896 (1963) which likewise provides for in camera inspection by the court. Reynolds, an executive privilege case, is also support for the in camera procedure followed here. Reynolds even indicates that where there is a sufficiently strong showing of privilege by the United States, a court may accept the claim of privilege even without an in camera inspection. And in Boeing, another executive privilege case, with facts far different than this action, the court specifically differentiated the situation there from the informer's privilege situation (280 F.2d, at 661).^{32/}

In short, the matter at hand is one of privilege. To give evidence relative to it would destroy it in the process of determining whether to uphold it. It is, therefore, no surprise that the court's have consistently held that claims of informer's privilege are to be resolved on the basis of an in camera inspection of the material sought.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION
IN HOLDING THAT THE PLAINTIFF HAD FAILED TO
SHOW GOOD CAUSE FOR THE PRODUCTION OF CERTAIN
DOCUMENTS.

^{32/} In support of that differentiation, Boeing cites the two absolute privilege decisions of the Supreme Court in the informer's privilege field: Vogel v. Gruaz, supra; In re Quarles and Butler, supra.

In addition to barring discovery of those documents which it concluded were covered by the informer's privilege, the district court held that plaintiff had not shown good cause for the production of certain other documents sought under Rule 34 of the Federal Rules of Civil Procedure. In this Court, plaintiff attacks this holding with reference to those documents pertaining to the removal of the listening device. For two separate reasons, this Court should not disturb the holding below.

1. This issue is not properly before the Court at this time. The reason is that the petition for leave to take the interlocutory appeal did not allude to the question, let alone make a showing that it was appropriate for consideration before the final disposition of the litigation.

An interlocutory appeal is permitted only when the district court certifies that its ". . . order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." 28 U.S.C. 1292(b); Cf: Courembis v. Independence Avenue Drug Fair, Inc., supra, 115 U.S. App. D.C. 7, 316 F.2d 658 (1963). Implicitly, the cited statutory provision portends that the issues must be designated clearly. Sass v. District of Columbia, 114 U.S. App. D.C. 365, 316 F.2d 366 (1963); United States Rubber Company v. Wright, 359 F.2d 784 (C.A. 9, 1966); In re Heddendorf, 263 F.2d 887 (C.A. 1, 1959). In addition, Rule 5(b), Federal Rules of Appellate Procedure

specifically provides that a petition under 28 U.S.C. 1292(b) must contain ". . . a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may ultimately advance the termination of the litigation."

Not only did plaintiff fail to raise the issue in his petition but, in addition, he has not shown (as he cannot) that there is involved in that issue a controlling question of law which should be passed on in an interlocutory appeal. Accordingly, the Court should not even consider the matter.

2. In any event, it is manifest that the district court's determination on this issue is entirely correct and proper. Basically, what the district court found was that plaintiff had neither alleged a sufficient need nor made a sufficient showing as to why he needed additional discovery from the United States in light of the facts already disclosed by it (A. 84, 47 F.R.D., at 274-5). Plaintiff's one response was that it was error to deny him production of documents dealing with the actual physical removal of the listening device on the ground that if the device had been left in place, even though unused, there would have been a continuing trespass and invasion of privacy (Brief of Appellant, pp. 46-48).^{33/}

^{33/} The complete list of the documents which plaintiff sought is set forth in the opinion of the district court (A. 81-82; 47 F.R.D., at 273). Apparently plaintiff recognizes the propriety of the ruling made as to the rest of the documents since he has not sought to appeal it as to those other documents.

Plaintiff's argument seeks to conceal the realities of the posture of his case. His interest in the trespass is a technical one only. This is apparent from one of the recent leading cases dealing with such surveillances. In Fowler v. Southern Bell Telephone & Telegraph Company, 343 F.2d 150, 156 (C.A. 5, 1965) the court said:

In the light of this general rule it is our view, and we believe the Georgia courts would hold, that tapping a telephone amounts to an intrusion upon plaintiff's solitude as to which no publication of the overheard information is necessary. We do not believe the Georgia courts would grant recovery in the absence of publication for planting a listening device in plaintiff's room, McDaniel v. Atlanta Coca-Cola Bottling Co., supra [60 Ga. App. 92, 2 S.E.2d 810 (1939)] yet deny recovery for tapping plaintiff's phone. The two situations involve essentially identical invasions of plaintiff's interests: the unauthorized, surreptitious eavesdropping on private conversations. The former situation, of course, involves a technical trespass, but the tortious injury arises from the eavesdropping, not from the trespass. (Emphasis supplied.)^{34/}

As is also apparent from Fowler, the invasion of privacy arises from the eavesdropping, and not (as plaintiff contends) simply from the presence of a listening device.

The district court, as already noted, has properly held that the United States has made as complete a disclosure as possible concerning the eavesdropping involved here in response

^{34/} Fowler also rejected an effort to distinguish McDaniel on the ground that McDaniel was decided on the basis of a Georgia eavesdropping statute. The court said: "However, the tort there [McDaniel] was treated as arising from the right of privacy." 343 F.2d, at 155-6.

to the allegations and questions presented by plaintiff. The only exception is the privileged identity of confidential informants. The United States has made a full disclosure concerning the circumstances of the installation, operation, monitoring and termination of the eavesdropping. It has turned over to plaintiff all transcriptions and writings made from the eavesdropping. It has held back nothing in that regard. In a very real sense, the United States has revealed and produced plaintiff's case for him. Certainly, the district court did not abuse its discretion, under these circumstances, in holding that plaintiff had in effect failed to show that good cause required by Rule 34, Federal Rules of Civil Procedure, for the production of documents relative to the removal of the listening device.

CONCLUSION

For the foregoing reasons it is respectfully submitted
that the order of the district court should be affirmed.

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DECEMBER 1969



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,542

FRED B. BLACK, JR.,

Appellant,

v.

SHERATON CORPORATION OF AMERICA, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

United States Court of Appeals
for the District of Columbia Circuit

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IN THE
UNITED STATES COURT OF APPEALS
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NO. 23, 542

FRED B. BLACK, JR.,
Appellant,

v.

SHERATON CORPORATION OF AMERICA, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

The Meaning of the Term Informer In the Informer's
Privilege

In its brief the Government refers repeatedly to "informants", "confidential informants", and the "informer's privilege", but never to informers. Indeed, it would appear the Government has stricken the word "informer" from its vocabulary.

However, the question at issue in this case is not whether persons connected with the Sheraton Carlton Hotel who assisted the Government in its eavesdropping on plaintiff's suite were acting as informants but whether those persons were acting as informers.^{1/} The reason is simple - there is a difference between an informer and an informant, and there is an evidentiary privilege which applies only to informers, not to informants.

The difference between informers and informants is clearly stated in Webster's New International Dictionary, Second Edition, 1952, at page 1276 under the word "informant", as follows:

"An INFORMANT is one who gives information of whatever sort; and INFORMER is one who informs against another by way of accusation or complaint."

It is the accusatory nature of what the informer does, the furnishing of information of violations of law as the Supreme Court put it in Roviaro v. United States, 353 U. S.

^{1/}

It should be noted that the question before the Court is whether the district court's ruling on a matter of law was correct or in error, not as the Government attempts to frame the question, whether there was an abuse of discretion by the district court.

53, 59 (1957), which distinguishes him from a mere informant and leads the law to create a conditional evidentiary privilege to protect his identity under certain circumstances.

As the plaintiff has shown, the informer's privilege as it has existed heretofore does not apply to the persons connected with the hotel because a person assisting in electronic eavesdropping is not informing. Whether a person assisting in electronic eavesdropping should be classified as an informant is immaterial to this case, for there is no informant's privilege in the law.

It is noteworthy that the Government makes no attempt to support the theory advanced in the district court's opinion that although the informer's privilege was narrowly drawn in Roviaro to apply only to persons who furnish information of violations of law, it has been broadly interpreted by the courts to apply to anyone who cooperates with or assists a law enforcement agency. By its silence on this point the Government effectively concedes that there is no support whatever in the cases for the district court's position. Instead of attempting to shore up the district court's shaky theory for bringing those who assist in eavesdropping under the traditional informer's privilege,

the Government now frankly asks this Court to create a new evidentiary privilege for it, an informant's privilege, on the basis of what the Government refers to as "policy considerations." (Brief for Appellee, p. 8) As indicated previously, the plaintiff submits that if ever there was a case where the courts should not create a new privilege for the Government, it is this case where the Government intentionally and deliberately undertook to violate the Constitutional rights of the plaintiff.

Apart from general statements in several cases about the informer's privilege which could apply to almost any aspect of law enforcement, i.e., "for the benefit of the general public", "a vital part of society's defensive arsenal", "effective law enforcement" (Brief for Appellee, pp. 8-9) the Government apparently relies upon a passage from In re Quarles and Butler, 158 U.S. 532, 535 (1894), as the chief support for its new privilege. However, even in this passage the Supreme Court does not say what the Government would have it say. Although there are references to several duties of the citizen, "to assist in prosecuting, and in securing the punishment of any breach of the peace", and "to act as part of the posse comitatus in upholding the

laws of his country," it is only "such information", i. e. the communicating of "any information which he had of the commission of an offence (sic) against those laws" which is said to be a "privileged and confidential communication". 158 U. S. at 535-6, (emphasis added). While In re Quarles and Butler, supra, states that a citizen has a number of duties where law enforcement is concerned, which no one would dispute, the only activity which is stated to be privileged is the furnishing of information of violations of law, which is the traditional informer's privilege, thus In re Quarles and Butler, supra, does not support the Government's new claim of privilege.

The plaintiff is not interested in engaging in a discussion with the Government as to the merits of its abstract theory that persons who assist or give information to the FBI in the course of a criminal investigation should have their identities protected from disclosure. That is simply not the question at issue here. Plaintiff's inquiry is not directed at the identity of persons who gave information about him to the FBI, it is directed to the identity of persons who assisted in the invasion of his privacy.

The Government misstates plaintiff's position with respect to the "decoy" type cases, Roviaro, supra, Gilmore v. United States, 256 F.2d 565 (5 Cir. 1958); United States v. Conforti, 200 F.2d 365 (7 Cir., 1952); and Wilson v. United States, 59 F.2d 390 (3 Cir. 1932). The plaintiff did not contend that the giving of assistance in addition to providing information of violations of law "precludes" the characterizing of a person as an informer, nor is there any reason for such a contention. Plaintiff contends quite simply that informing is furnishing information of violations of law, and that one who furnishes such information is an informer, one who does not is not an informer.

Plaintiff further contends that in no case has any person who did not furnish information of violations of law ever been held to be an informer, the Government in its brief does not dispute this contention or cite a single case to the contrary.

Plaintiff then went further and pointed out that even if the persons involved in this case are deemed informers, the decoy cases stand for the proposition that the informer's privilege should not apply where the alleged informer was a participant in the very events at issue before the court.

The Government is correct in its statement that the plaintiff rejects out of hand the Government's claims of support in public policy for its position in this case. These claims by the Government usually take the form of references to the public interest in "effective law enforcement," or the like. However, what is at issue in this case is an invasion of plaintiff's privacy and a violation of his constitutional rights. Rather than describe such activity as "effective law enforcement" it would seem more accurate to describe it simply as law breaking. When that is done much of the confused thinking indulged in by the Government evaporates into the thin air from whence it came.

There is neither precedent in law nor a basis in reason or policy for the courts to extend the informer's privilege to persons involved in electronic eavesdropping, and there is certainly no reason for the creation of a new evidentiary privilege in this case. As was said in Timken Roller Bearing Company v. United States, 38 F. R. D. 57, 64 (N. D. Ohio, 1964)

"the traditional privileges have been established only after generations of jurists and/or legislators have recognized a social interest greater than a fully informed search for truth."

What is needed in the area of electronic eavesdropping by the Federal Government and those who assist it is not a new privilege but "a fully informed search for truth."

Applying the law to the facts of this case

The Government's contention that the district court did not err "in the facts of this case" in declining to order the Government to reveal the identity of the persons who assisted in the electronic eavesdropping is without substance because the facts of this case are not in the record. The Government attempts to avoid the thrust of the Roviaro requirement of a balancing based on the facts of the particular case by the claim that the privilege is absolute in civil cases, which is patently untenable.

The court is asked to overrule its decision in Westinghouse Electric Corp. v. City of Burlington, Vermont, 122 U. S. App. D. C. 65, 351 F.2d 762 (1965), but the Government does not cite a single case in support of its absolute-in-civil-cases position. In truth, no court has held that Roviaro does not apply in civil cases, that is, it has been held, in every civil case in which the question has been raised, that Roviaro applies and the informer's privilege

is no longer absolute. See, e. g., in addition to Westinghouse, supra, Mitchell v. Bass, 252 F.2d 513 (8 Cir. 1958); Mitchell v. Roma, 265 F2d 633 (3 Cir. 1959); Mannefrid v. Teegarden, 23 F.R.D. 173 (S.D.N.Y., 1959); United States v. Swift & Co., 24 F.R.D. 280 (N.D. Ill. 1959); Clark v. Pearson, 238 F. Supp. 495 (D.D.C. 1965); Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa., 1962).

The Government attempts to construe Roviaro narrowly and to limit it to the particular fact situation there at issue but the Supreme Court in Roviaro has consistently been interpreted by the courts as addressing itself to the informer's privilege as such and changing it from an absolute to a limited privilege. See the cases cited above. Although the Government asks the court to overrule Westinghouse, it does not address itself to the grounds on which this court based its decision in that case, nor is there any claim that the experience under the rule in that case has been such as to require the court to reconsider the ruling there made. In short, the only reason for asking that Westinghouse be overruled is that the Government's absolute refusal to make any disclosure at all about this eavesdropping is incompatible with the law of this circuit as stated in Westinghouse.

When it turns to the district court's purported balancing of factors, the Government is on no stronger ground. The "categories" of cases to which the court and the Government attempt to limit disclosure in civil cases were concocted by the Government for purposes of this case, and adopted by the district court only after his in camera reception of the evidence, to justify his refusal to permit inquiry into the facts of the case. What this categorizing amounts to is a resurrection of the old absolute privilege theory for purposes of this case. It is directly contrary to the teaching of Roviaro and Westinghouse that the decision is to depend on the particular circumstances of each case. Most of the cases cited by the Government for the "wide range of civil cases in which disclosure has been denied" are inapplicable on their face for they predate Roviaro and were decided under the old absolute privilege theory. The remaining cases hardly support a claim to the "weight of authority", e. g., Grogan v. United States, 261 F2d 86 (5 Cir., 1958), is irrelevant, for the identity of the informer was not even sought in that case. There is no indication that Roviaro was even brought to the attention

of the court in In re Gurnsey's Petition, 223 F. Supp. 359 (D. D. C. 1963), and the law in this circuit was developed further, and to the contrary, by this court in Westinghouse a few years later. The other cases quite properly were decided on their own particular facts, not on the weight of authority. For example, in Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E. D. Pa. 1962), a case where the information furnished by the informer had been disclosed, the court stated

"The identity of the source of the information, as opposed to its accuracy, was not relevant on either issue, nor was the disclosure of this identity on the third day of the trial 'essential to a fair determination of the issues.'" 203 F. Supp. at 407.

Such cases are hardly applicable here. The only "factors" in this case to which the Government can point to oppose disclosure are general considerations which exist in every case where the privilege is claimed, i. e., the importance of informers or informants in the work of the FBI. The suggestion that the informers did not have knowledge of the eavesdropping is not supported by evidence in the record. Mr. Pennypacker's affidavit does not indicate that the person discussed was connected with the hotel or was the only person connected with the hotel who was involved in the eavesdropping. What knowledge such a person had would

seem to depend on what he did and the circumstances surrounding his use, not on Mr. Pennypacker's self serving conclusions as to his knowledge. Moreover, since cross-examination of Mr. Pennypacker about this affidavit was not permitted, the contents of the affidavit are not properly in evidence.

The Government's assertion that the Constitution is not self executing in terms of damages conveniently misses the point of plaintiff's argument that the imperative of judicial integrity requires the court to deny the privilege here. Surely where the activities of Government officials and agents are at issue in a case the courts are not required to blind themselves to the fact that those activities were in violation of the individual's Constitutional rights.

Moreover, the fact that the Constitution is not self executing in terms of damages is all the more reason for the courts to be alert for and to adopt methods of deterring and preventing violations of the Constitution. See Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 409 F.2d 718, 725 (2 Cir. 1969), and as plaintiff has shown, requiring disclosure of the identity of the persons who assisted in the electronic eavesdropping in this case may well prevent future violations of the Constitution where Government

agents require the assistance of private parties. Such a rule will not deter cooperation with legitimate law enforcement efforts, for if the agents have a warrant or a court order authorizing their eavesdropping, persons assisting them will presumably be immune from civil liability just as the agents are under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2516.

The assertion that the cases do not support the denial of a privilege where the Government's activities are wrongful is mistaken. For example, in Singer Sewing Machine Co. v. N. L. R. B., 329 F.2d 200, 208 (4 Cir., 1964), the court stated that "where a prima facie case of misconduct is shown, justice requires" that a privilege be denied. The anomaly of the Government, which has grossly invaded plaintiff's privacy, seeking a privilege to protect the privacy of its own records and information concerning this event, is highlighted by the following passage from Bank of Dearborn v. Saxon, 244 F. Supp. 394, 402 (E. D. Mich. 1965), where the privacy referred to is that of the Government:

"This question cannot be resolved in the abstract. The merits of the particular

"matter before the court must be considered, the necessity of disclosure weighed against the need for privacy in the light of the circumstances disclosed. Here we have a claim of subterfuge, of sham, of the use of devices bordering on fraud whereby, it is alleged, the Comptroller's office sought to cloak an illegal act in the habiliments of legal propriety and good faith. It is asserted that the device employed is so patently an evasion of our law that the files themselves cannot fail to disclose it. A prima facie case was, in fact, made out early in our proceedings. At times circumstances are such as to challenge the conscience of the Chancellor."

The privilege was denied.

Even if there were no precedent for such a rule, however, the very policy considerations which underlie the grant of evidentiary privileges to the Government would require its adoption. Such privileges are granted because of the presumption, most often valid, that the Government acts in the public interest. Where the actions of the Government are intentionally and directly contrary to the Constitution, they are not and cannot be in the public interest, and in the absence of any national security considerations or military secrets, they cannot be cloaked in the protective covering of an evidentiary privilege.

Due Process and the Court's In Camera Reception of Evidence

Before reaching the Government's contentions on the question of due process, it should be noted that nowhere in its brief does the Government even attempt to address itself to what is at the heart of plaintiff's position on this question - his right to cross examination of the Government's witnesses. This is not surprising to the plaintiff, for the brief in this court is the third occasion on which the plaintiff has argued that he has been deprived of his right of cross examination,^{2/} and neither the district court nor the Government has yet ventured to even discuss the question, or acknowledge that the point has been raised.

In addition, the Government does not deny, for it cannot, that the district court's in camera examination of documents constituted a reception of evidence on an evidentiary question at issue before the court out of the presence of the plaintiff, and that the district court's decision that the informer's privilege applied here was based on the informa-

^{2/} The question was previously raised in the district court in plaintiff's motion to modify the court order for in camera proceedings, and in plaintiff's petition for immediate appeal in this court.

tion contained in those documents. In short, what the Government does not say on the question of due process is of far more significance than what it does say. The claim that the question of due process is not properly before this Court is mistaken.

While plaintiff objected to any in camera examination of documents by the court because he saw no reason for such an examination and because he believed that many of the documents were irrelevant and might be gravely prejudicial to him, all the parties and the court recognized that an evidentiary hearing could be held after the court's in camera examination as well as before. Thus the objection to in camera proceedings as such was not based on due process grounds. In fact, the plaintiff acknowledged that it would be proper for the court to determine the identity of the alleged informer in camera, in order to be able to rule at an evidentiary hearing whether answers to particular questions would disclose his identity.

It is not plaintiff's contention that he was denied due process by the court's in camera examination of documents but by the courts's in camera reception of evidence. What deprived the plaintiff of due process of law was the fact that the court, having viewed the Government's documents

in camera, immediately decided the question at issue before it on the basis of the information contained in those documents, instead of giving the plaintiff an opportunity to cross examine the Government's witnesses who were testifying through those documents.

An interlocutory appeal from the district court's order of June 6, 1969, authorizing the Government to submit its documents for in camera examination, would not have raised the question of the propriety of the district court's basing a decision on the documents viewed in camera, since the court had not done so at that time. The result of the in camera examination of documents could have been and plaintiff submits it should have been, an order that the Government turn over the documents with the identity of the informer or informers deleted. A hearing could then have been held on the question whether the identity of those persons should be disclosed. It was the court's failure to do this, rather than his viewing of the documents in camera which deprived the plaintiff of due process.

Furthermore, even if the above were not the case, the decision to view the documents in camera was part and parcel of the court's decision on the motion to compel

answers to questions which was then pending before him, and which is now before this court. It makes no sense and serves no purpose to compartmentalize the proceedings in the district court to the extent that the procedures employed by the court in reaching its decision are not reviewable in passing on the propriety or correctness of the decision reached.

The Government's second contention, that the court was required to hold an in camera hearing, does not go to the question at issue and has already been disposed of. As explained above, it is not the fact that an in camera examination of documents was held which denied the plaintiff due process, but that the decision was based on secret review of secret evidence.

In addition, the reference to Roviaro, Westinghouse, and the other cases cited as requiring in camera proceedings do not support what was done in this case. In Roviaro for example, as in every other informer's privilege case, the facts and circumstances surrounding the use of the informer and the details as to the role played by the informer were disclosed. When the court in Roviaro speaks of in camera proceedings it was only with respect to the identity of the informer, for that was all that was claimed to be privileged

and that was all that was kept from the opposing party.

The plaintiff has not denied the court's right to determine in camera the identity of the persons in question in this case. However, plaintiff has found no precedent and the Government cites none for the in camera proceedings here, where the court viewed all the Government's evidence in camera and ruled on the question whether the informer's privilege should apply on the basis of that in camera reception of evidence. Plaintiff submits that neither Roviaro nor Westinghouse, nor any other case authorizes the manner of proceeding followed by the district court in this case, and that Greene v. McElroy, 360 U. S. 474 (1959), and the other cases cited in plaintiff's brief prohibit such a proceeding.

Removal of the Microphone

The question of the propriety of the district court's denial of discovery as to when the microphone was removed from the wall of plaintiff's suite is properly before the Court on this appeal, for the order of the court denying such discovery is the order from which appeal has been taken. It is true that for immediate review of an interlocutory order under 28 U.S.C. § 1292(b) there must be a certification by the district court that the order contains a controlling question of law, which was done in this case, and that the Court of Appeals must grant the appeal, which this Court has done. However, it is the order that is appealed from, and there is no suggestion in § 1292(b) that once the order is before the Court of Appeals, the scope of that Court's review is limited to the substantial question of law presented. Neither is there any precedent for such a view, and the Government cites none.

Surely the Court has the right and obligation to correct error in a lower court decision properly before it for interlocutory review, whether the particular error in question involves a controlling question of law or a major issue of fact peculiar to the unique circumstances of the case.

The suggestion that the scope of the Court's review should be controlled by what a party claims to be the controlling questions of law in its petition for immediate appeal is not worthy of consideration.

for it is obvious that parties seeking interlocutory appeal would simply designate every issue in a case a controlling question of law in order to get them all before the court if the appeal is granted.

Plaintiff submits that the scope of review of the district court's order is within the discretion of the Court, and that a better view of an appeal under § 1292(b) is that stated by the Fifth Circuit in Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702-703 (5 Cir., 1961):

"[T]here are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn. The amendment was to give to the appellate machinery of § 1291 through § 1294 a considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided. It is that general approach rather than the use of handy modifiers--which may turn out to be Shibboleths--that should guide us in its application and in determining whether the procedure specified has been substantially satisfied." (Footnotes omitted.)

The Court should reverse the district court's ruling on the question of when the microphone was removed from the wall of plaintiff's suite. In the Solicitor General's Supplemental Memorandum to the Supreme Court concerning this eavesdropping it was stated at page 2: "The installation was removed and the monitoring was terminated on April 25, 1963." However, during the examination of the

agents involved at the hearing before the plaintiff's second trial for tax evasion, and in the depositions in this case, evidence has come to light which indicates that the microphone may not have been removed on April 25, 1963. Mr. Pennypacker's testimony raises the following questions:

1. When was the microphone removed?
2. If it was left in place after April 25, 1963, why was it left in place?
3. If it was left in place was it reactivated at a later date?
4. If it was reactivated at a later date, what was overheard during this later monitoring?
5. If the microphone was reactivated and monitored, was the information obtained thereby used against plaintiff?

All these questions are directly relevant to plaintiff's cause of action and to the question of the damages he has sustained as a result of the invasion of his privacy, and they are not disposed of by any disclosure or admission by the Government. The Government has remained silent on the question of when the microphone was removed. Thus there is no indication in the record whether the microphone was ever reactivated. In the absence of some statement on these matters there is good cause for permitting the plaintiff to obtain discovery of any relevant Government documents.



Conclusion

For the foregoing reasons, it is respectfully submitted that the Government's claim of privilege in this case should be denied and the district court should be instructed to permit discovery by the plaintiff as to when the microphone was removed from the wall of his suite.

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